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TREATISE

ON THE LAW OF

INSURANCE,

IN FOUR BOOKS;

I. OF MARINE INSURANCES,
II. OF BOTTOMRY AND RESPONDENTIA,
III. OF INSURANCE UPON LIVES,
IV. OF INSURANCE AGAINST FIRE.

By SAMUEL MARSHALL,
SERJEANT AT LAW.

IN TWO VOLUMES,

VOL. II.

Laudo mercatorem, qui fidem, etiam contra leges datam, ſervat; ſed, et laudo judicem, qui fraudes et nequitias mercatorum non fovet, et reſcindit pactiones, quas lex reſcindi jubet. Judicis eſt leges ſequi; nec diſputare an turpiter faciat aſſecurator, qui fidem datam violat.—Eſto, turpiter faciat; ſed, et turpiter facit qui contra leges paciſcitur.

Bynk. Quæſt. jur. priv. lib. 4. c. 5.

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1802.

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TREATISE

ON THE

LAW OF INSURANCE.

BOOK THE FIRST.

CHAP. XI.

Of the Ship.

IN every marine insurance the ship must always be an object of great interest to both parties. From the nature of the contract, there are certain stipulations or conditions implied in it, relative to the ship, which the insured is bound to fulfil. These are, that the ship shall be sea-worthy; that she shall not be changed, unless from necessity, without the consent of the insurers; and that she shall be conducted and navigated according to law. These matters which embrace all that it will be necessary to say on the subject of the ship, will be considered under the following heads:

1. Of the sea-worthiness of the ship;
2. Of changing the ship;
3. Of insurances on goods in "*ship or ships*;"
4. Of the conduct of the ship.

Sect. I.

Of the Sea-worthiness of the Ship.

No loss arising from the internal defect of the thing insured can fall upon the insurer.

IT is clear, from the authority of all the writers on the subject of marine insurances, as well as upon principles of natural justice, that no loss occasioned by the internal defect of the thing insured, shall fall on the insurer; and therefore, if the ship be found incapable of performing the voyage insured, and her inability do not proceed from any accident or misfortune, or from the violence of the winds

or waves, but from latent defects, existing before the voyage commenced, the insurer is discharged (*a*).

There is an implied warranty in every policy, on ship or goods, that the ship shall be sea-worthy.

There is, moreover, in every insurance, whether on ship or goods, an implied warranty that the ship shall be sea-worthy when the risk commences; that is, that she shall be *tight, staunch and strong, properly manned, provided with all necessary stores*, and in all respects fit for the intended voyage.—The consideration of the insurance is paid, in order that the insured may be indemnified against certain contingencies; and it supposes that the insurer may gain the premium; But if the ship be incapable of performing the voyage, there is no possibility of the insurers gaining the premium, and in that case, the contract, on his part, would be without consideration, and consequently void.—The insurer undertakes to indemnify the insured against the *extraordinary and unforeseen perils of the sea*, and it would be absurd to suppose that any man would insure against those perils, but in the confidence that the ship is in a condition to encounter the *ordinary perils* to which every ship must be exposed in the usual course of the voyage proposed.

In *France*, every ship is surveyed before the voyage commences.

By the law of *France* it is directed, that every merchant ship, before her departure from the place of her out-fit, shall be surveyed by certain officers appointed for that purpose, and reported to be sea-worthy, (*en bon état de navigation*); and that, previous to her return, before she takes her homeward cargo on board, she shall be again surveyed.—*Valin* (*b*) shews how little confidence he placed in these surveys, which, he says, are only made upon the external parts, for the ship is not unsheathed, and therefore the inward and hidden defects are not discovered.—Indeed it seems to be much better to leave the validity of the policy to depend on the sea-worthiness of the ship, to be ascertained after a loss has happened, by an investigation of the true cause, than to permit so important a question to be decided by the report of mercenary officers. A ship may, to all appearance, be perfectly capable of performing a voyage, and it is only after a loss has happened that her latent defects

But the report upon such survey was not sufficient proof of sea-worthiness.

(*a*) *Le Guidon*, c. 5, art. 8, *Valin*, tom. 1, p. 654, tom. 2, p. 80. *Pothier*, h. t. n. 66, *Emerig.* tom. 1, p. 580, Ord. de la mar. h. t. art. 12. 2 *Mag.* 90, 140.—(*b*) Tit. *fret.* fur. art. 12.

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are diſcovered, and her true ſtate at the time of her departure comes to be known. Nor was the ſurvey thus made by the *French* concluſive to prove that the ſhip at her departure was ſea-worthy. It raiſed a *preſumption* that ſhe was ſo; but it ſtill remained open to the inſurers to ſhew the contrary.

A ſhip ſhall be *preſumed* not to have been ſea-worthy, unleſs it be made appear that her diſability aroſe from ſea-damage or other misfortune.

As the inſurer is only liable for loſſes ariſing from the *extraordinary and unforeſeen perils of the voyage*, if the ſhip become innavigable, or incapable of proceeding on the voyage inſured, all the writers agree that the *preſumption* ſhall be that this proceeded from the age and rottenneſs, or other defect of the ſhip, unleſs it be made *appear* to have been occaſioned by ſea damage or ſome unforeſeen accident (*a*). The reaſon aſſigned for this is, that, by the marine law, an *indefinite* innavigability is never claſſed among the perils to which the inſuret is liable; becauſe a thing ſo ſubject to be injured by time and the uſe which is made of it, cannot be ſuppoſed always to retain its original ſtate; and that, though a ſhip may, at the time of her departure, appear capable of performing the voyage inſured; yet, if the voyage ſhould prove longer than uſual, her internal defects will ſometimes become apparent, from time, from the preſſure of the cargo, and from the action of the ſeas, without any extraordinary accident.

A ſhip ſprings a leak at ſea, and is forced by contrary winds to run for the neareſt port, where ſhe is pronounced innavigable:—Whether this ſhall be *preſumed* to have ariſen from her not having been ſea-worthy when ſhe ſailed.

Caſaregis (*b*), in ſupport of this doctrine, cites the following deciſion of the *Rota* of *Florence*.—A ſhip, with a cargo of goods on board, ſailed from *Cadiz* for *Amſterdam*; and when ſhe was off *Cape St. Vincent*, ſhe was forced by a ſtrong north wind to put into *St. Croix de Teneriff*, to avoid foundering. Being there ſurveyed, ſhe was, by the conſul, pronounced to be *innavigable*.—The inſured inſiſted that the above circumſtances amounted to ſufficient evidence of the loſs, which could only be attributed to the contrary winds, which, having cauſed

(*a*) *Targa*, ch. 60, p. 256. *Pothier*, h. t. n. 66. *Caſaregis* diſ. 142, n. 15. *Valin*, ſur art. 28, 29, & 46, h. t. p. 76. In p. 98, he ſays, "La preſomption eſt, que le mauvais état du navire vient de ſon propre vice."—(*b*) Loc. cit.

the

the ſhip to ſpring a leak, had rendered her innavigable.—The inſurers replied that the inſured were bound to give *concluſive* evidence of the loſs; that the witneſſes examined by the conſul did not depoſe that the loſs was occaſioned by the contrary winds; that the leak did not ſhew a right to abandon, becauſe in the courſe of a voyage it ſometimes happens to the beſt ſhips to ſpring a leak, without any extraordinary ſea-damage.—The judges of the *Rota* adopted theſe reaſons, and decided in favour of the inſurers. Their judgment was delivered to the effect following:—The queſtion being, whether the ſhip had been declared innavigable on account of the violence of the contrary winds, or on account of ſome peculiar and inherent vice, *it has appeared to us*, that this being the caſe of innavigability, it ought rather to be attributed to the inherent vice of the ſhip. The bad condition of the ſhip is *preſumed* to proceed from an ancient, certain, inherent, natural, and conſtantly-operating cauſe, rather than from the effect of the winds, which is accidental and extrinſic (*a*). Decay and rottenneſs are reputed the moſt active and moſt powerful cauſes from which innavigability can proceed (*b*). A ſtorm is not deemed a ſufficient cauſe of a loſs, if this can be ſhewn to have proceeded from the inherent vice of the thing inſured. The mere *poſſibility* that the injury has not been occaſioned by the ſea, is enough to ſhew that the proof of the inſured is inſufficient (*c*).

Emerigon, however, holds that, in conſideration of the previous ſurvey, the preſumption that the ſhip was ſea-worthy when ſhe ſailed ſhall prevail till the inſurers ſhew the contrary; and he cites a number of deciſions of the

(*a*) Totum damnum referri debet cauſæ antiquiori, originali, certæ, et intrinſecæ fragilitatis et vetuſtatis navis, n. 22.—(*b*) Vitium intrinſecum infectionis et corruptionis reputandum ſit pro cauſâ potentiori, et majoris activitatis, ex prædictis, cui propterea principaliter effectus eſt attribuendus, n. 24.—(*c*) Sola poſſibilitas in contrarium ſufficit, ut probatio non dicatur ſufficiens. n. 36, &c.

admiralty

admiralty court of *Marſeilles* upon this point, from which it would ſeem that no evidence of the rottenneſs, or of the decayed ſtate in which the ſhip may be found *after ſhe ſails*, is ſufficient to countervail the report of the previous ſurvey (*a*).

And it muſt be owned that, in practice, though the rule, as laid down by the writers above cited, ought never to be loſt ſight of, many difficulties may ariſe from too ſtrict an obſervance of it. Where a ſhip is loſt, or is condemned in the courſe of the voyage, as being incapable of proceeding to her place of deſtination, and this cannot be aſcribed to ſtreſs of weather or any accident in the voyage, the fair and natural preſumption is, that ſhe was not ſea-worthy; and then it is incumbent on the inſured to ſhew that, at the time of her departure, ſhe was in fact ſea-worthy. This preſumption is founded upon principles of public policy, which require that the ſhip, at the time of her departure, ſhall be in ſuch a ſtate as to be capable of encountering the ordinary perils of the voyage inſured; and this muſt be the true meaning of the words, "*tight, ſtaunch, and ſtrong*," uſed in charter-parties. However perfect a ſhip may be in herſelf, yet, if ſhe be incapable from the nature of her conſtructure, or any other cauſe, of performing the voyage inſured, with the propoſed cargo on board, ſhe is not ſea-worthy. She muſt be, in all reſpects, fit for the trade in which ſhe is meant to be employed. And it is a wholeſome rule that the inſured ſhall be held to pretty ſtrict and cogent proof of this. It is alſo a wholeſome rule, that this proof ſhall not only be cogent and ſtrong to ſhew the ſhip's ſufficiency at the time ſhe ſailed, but alſo that the inſured ſhall bring forward *all* the evidence which he has upon the ſubject; particularly

(*a*) *Valin* ſur art. 29 h. t. ſeems to have theſe deciſions in his mind when diſcuſſing this point, he ſays,—"On cite ſur ce ſujét pluſieurs arrets d'*Aix* et des ſentences de *Marſeille* contre les aſſureurs; mais ces prejugés, pour etre juridiques, doivent avoir été rendus ſur des preuves *que les navires avoient été rendus innavigables par fortune de mer*. Cependant qu'eſt ce que ces preuves pour l'ordinaire? Des procès-verbaux frauduleux de la part des capitaines, toujours diſpoſés à favoriſer les armateurs, ſans egard à la vérité et la juſtice."

what

what relates to the ſtate ſhe was in when the loſs happened, or when ſhe was condemned as unfit to proceed on the voyage. If any thing ſhould be withheld which the inſured might have produced, it will always throw great ſuſpicion on his caſe. Too much often reſts on the ſingle teſtimony of the maſter, always inclined to favour his employers (*a*).—If, on the other hand, it appear from the facts of the caſe, that the loſs may be fairly attributed to ſea-damage or any other unforeſeen misfortune, but yet the inſurers mean to alledge that the ſhip at her departure was not ſea-worthy, the *onus probandi* will lie on them. This ſeems to be the ſimpleſt rule; and the ſimpleſt rules are always the beſt, particularly in matters of commerce.

If the loſs or diſability of the ſhip may be fairly aſcribed to ſea-damage, the proof of unſea-worthineſs lies on the inſurers.

If it be clearly aſcertained that the ſhip, at the time of her departure, was not in a condition to perform the voyage inſured, neither the innocence or ignorance of the inſured, nor any precautions he may have taken to make her ſea-worthy, will avail him againſt the breach of his implied warranty.

Neither the ignorance or innocence of the inſured will avail him againſt a breach of this implied warranty.

Thus; The plaintiff had purchaſed a ſhip, and after having her ſurveyed by proper perſons, ſent her into dock, and there had her fully repaired; and the ſhip-builder was ready to ſwear that he had effectually repaired her, as he thought, having done all that was requiſite to make her a good ſhip. Being then taken into government ſervice, ſhe was, as uſual, ſurveyed by the perſons employed for that purpoſe, and reported to be a good ſhip. She ſailed out of the *Thames*, and arrived at *Portſmouth*; but being very leaky with bad weather, the admiral ordered her to go into port, and undergo a ſurvey there. This was done, and it was found, on opening her, that ſome timbers near her keel were very bad; inſomuch that ſhe was condemned as inſufficient to proceed. The plaintiff having inſured her, brought an action on the policy to recover the loſs, and at the trial inſiſted that he had a right to prove, and could prove, that he had done every thing in his power to ſend her out a good and ſufficient ſhip; but that her diſability was

The purchaſer of a ſhip ſends her to be docked and completely repaired, and the ſhip-builder is ready to ſwear that this was done; yet if it afterwards appear that ſhe was not ſea-worthy, though this proceeded from a latent cauſe, the policy is void.

Lee v. *Beach*, at N. P. after M. 1762.

(*a*) Vid. ſup. 367, n.

was the effect of a *latent cauſe*, not known to him or diſcovered when ſhe was ſurveyed, or in the dock repairing.—Lord *Mansfield*, who tried the cauſe, ſaid that it appeared that the ſhip had *died a natural death*, and had received her death's blow before the riſk commenced; and, however innocent the plaintiff might be, and however cautiouſly he had acted, the underwriter was equally innocent; and the implied warranty muſt and ought to have its effect; and he nonſuited the plaintiff.

And the inſured being unacquainted with the ſtate of the ſhip, does not alter the caſe.

Oliver v. *Cowley*, at N. P. after Tr. 1765.

So, where an inſurance was made on goods on board the *Amy and Lætitia*, at and from *Montſerat* to *London*, the ſhip ſailed the 16th of *July*, and the next day, without any bad weather, ſhe was found to be very leaky, and obliged to run for the iſland of *St. Thomas* where ſhe was unloaded, and the goods, being much damaged, were ſold. In an action on the policy to recover for this loſs, it was agreed, on the one hand, that the ſhip was not ſea-worthy to undertake the voyage inſured; and on the other, that the inſured was totally ignorant of this, when the goods were ſhipped.—The plaintiff was nonſuited.—Lord *Mansfield* ſaid, that the implied warranty could not be diſpenſed with in any caſe: However, as it was a queſtion of law, he would ſave the point; but the plaintiff's counſel declined this, being ſatisfied that it was againſt them.

If the ſhip be not ſea-worthy, the policy will be void, though both the inſured and the captain believed her to be ſea-worthy; and though the inſurers knew the ſtate ſhe was in as well as the owners.

Though the owners may not know the true ſtate and condition of the ſhip in a diſtant part of the world, yet, if they inſure, the law will preſume that the maſter, or ſome other agent, will take care that the ſhip be ſea-worthy before ſhe ſails. Hence it is, that though a ſhip has been long abſent in the remoteſt parts of the world, if an inſurance be made on her homeward paſſage, the warranty that ſhe was ſea-worthy at the time of her departure, is as ſtrongly implied in the contract, as if ſhe had ſailed from an *Engliſh* port. And though no fraud be imputable to the inſured; though they ſuppoſed, or believed, that the ſhip was in all reſpects ſea-worthy; though no blame be imputable to the maſter, or any other agent of the inſured; and though the underwriters were as well acquainted with the ſtate and condition of the ſhip as the owners; yet, if in fact ſhe was not ſea-

worthy at the time of her ſailing; the contract will be void. Theſe principles will be found fully eſtabliſhed in the following caſe.

Mills and another v. *Roebuck*, *Park*, 221.

An inſurance was made on a ſhip called the *Mills Frigate*, loſt or not loſt, "from the *Leeward Iſlands* to *London*, "beginning the adventure from her arrival at the *Leeward* "*Iſlands*."—In an action on this policy, the declaration ſtated the loſs to have ariſen, from divers leaks ſprung by the ſhip, from the ſtarting of planks, and occaſioned by tempeſtuous weather and the mere perils of the ſea. Upon the trial of the cauſe, it appeared,—That the ſhip was *French* built, and the defendant knew her to be ſuch: That the bolts of ſuch ſhips being iron, growruſty and break; and then the timbers ſuddenly become looſe, and the ſhip is thereby rendered incapable of bearing the ſea, without any *viſible* marks of decay: That ſhe had been generally employed by the plaintiffs in the *Weſt India* trade, and large ſums conſtantly inſured on her: That before ſhe ſailed on her laſt voyage, ſhe was put into complete repair; but her iron bolts could not then be examined without taking off her ſheathing, which had not long before been put on: That the firſt underwriter on the policy, with others, kept a regiſter of all ſhips inſured by them, containing a particular deſcription of each, and employed a ſurveyor to examine them: That the *Mills Frigate* had long been entered in this regiſter, and, before her laſt voyage, was examined by the ſurveyor, and found fit to undertake the voyage *to and from* the *Leeward Iſlands*: That the firſt underwriter knew as much of the condition of the ſhip as the plaintiffs, and underwrote 400 l. on her outward voyage: That at *St. Kitts* ſhe had ſuch a repair as was deemed ſufficient for her homeward voyage, but her bolts could not be examined there: That at *Nevis*, where a loading was expected, the planters, knowing ſhe had been leaky on her outward voyage, refuſed to put ſugars on board her; but to ſatisfy them, a ſurvey was made by the captains, who reported that ſhe was ſtrong and ſound, and, when caulked, would be fully ſufficient to carry a cargo to *London*: That ſhe was accordingly caulked, and during

two

two months, while ſhe was loading, continued tight: That the day after ſhe failed from *Nevis*, without any bad weather, ſhe ſprung a leak, which obliged the captain to bear away for *St. Kitts*, where ſhe arrived in two days, and it was there found that ſhe had ſtarted a plank, and on being ſurveyed, ſhe was reported to be unfit to proceed on her voyage, without a thorough repair, which would coſt more than the value of the ſhip and freight; and which, at all events, could not be had at *St. Kitts*, for want of docks and materials, and that ſhe was unfit to ſail elſewhere to be repaired: That the ſtarting of the plank was owing to the iron bolts being ruſty and decayed and breaking off in the plank; and that as other bolts might be in the ſame ſtate, it was concluded that the ſhip was not at the time ſhe ſailed from *Nevis* for *London*, fit to perform that voyage; and this the captain now believed, though, to all outward appearance, ſhe was a good ſhip, and, as he thought when he ſailed from *Nevis, proper for the voyage*; but had he known the decayed condition of her bolts before he ſailed on his homeward voyage, he would not have ventured his life in her: That while the ſhip was at *St. Kitts*, the captain wrote to the plaintiffs, giving them an account of his outward voyage; mentioning the bad weather he had had, and the *leaſened, weak, and leaky ſtate of the ſhip*, and the neceſſity he was under of having *her upper works new nailed*: That the plaintiffs gave this letter to a broker to get an inſurance made on the ſhip, freight, and cargo; which being ſhewn to the firſt underwriter, he choſe to inſure the ſhip, ſaying, ſhe would come home ſafe enough, notwithſtanding the damage ſhe had received, it being a ſummer voyage; but ſhe would very likely damage her cargo; and being about to underwrite 300l. the broker told him he was a bold man to write ſo much, after reading the letter, upon which he altered the *three* into a *two*: That the broker ſhewed the ſame letter to all the other underwriters before they underwrote. The defendants demurred to this evidence, upon which the court gave judgment for them. A writ of error was then brought in the Exchequer Chamber, which was referred to Lord *Mansfield*

field and Lord C. J. *Wilmot*, who after argument, reported their opinion to be in favour of the defendants, and judgment was given for them accordingly (*a*).

Observations on the above case.

The principles upon which this opinion was founded were not publicly declared, because it is not usual, upon a writ of error from the court of *Exchequer* to the *Exchequer Chamber*, for the judges, to whom it is referred, to deliver their opinions publicly. It is evident, however, that it must have been decided on the ground that the ship, at the time she sailed from *Nevis*, was not sea-worthy; and that for this cause, the policy was void, though these things were clear; 1st, That the plaintiffs were innocent; 2dly, That the underwriters, at the time they subscribed the policy, knew as much of the state and condition of the ship as the plaintiff did; and, 3dly, That no blame was imputable even to the captain, or any other agent of the plaintiffs. In the case of *March* v. Lord *Pigot*, this is alledged by counsel in argument to be the ground of this decision (*b*). But Lord *Mansfield* is there made to deny it. Little regard, however, seems to be due to this report; not only because the facts of the case of *Mills* v. *Roebuck*, will warrant a decision in favour of the defendant upon no other ground than that of the ship's not being sea-worthy; but also because Lord *Mansfield* is made in that report, to deny and confirm this doctrine almost in the same breath.

In what cases the *insurer*, and in what cases the *owners*, shall make good the damage done to goods from the insufficiency of the ship.

Where the goods insured have sustained a damage in the voyage from the insufficiency of the ship, the question, whether the owner or master of the ship be liable to make good the loss, depends on the question whether the ship was in a condition to perform her voyage at the time of her departure, or became defective from

(*a*) Before this action in the Exchequer was brought, an action on the same policy had been tried in the court of Common Pleas, before Lord *Camden*, who directed the jury to find for the plaintiff. But upon a motion for a new trial, he altered his opinion, and the court unanimously determined that the ship, not being sea-worthy, the plaintiffs, however innocent they might be, could not recover.—(*b*) 5 *Bur.* 2804.

ſtreſs of weather and the perils of the ſea (*a*). But it is ſufficient if the ſhip be ſea-worthy at the time of her ſailing. She may ceaſe to be ſo in twenty-four hours after her departure, and yet the underwriters will continue liable. The queſtion, however, in ſuch caſes, will always be, whether her diſability aroſe from any defect exiſting *before* her departure, or from a cauſe which occaſioned it *afterwards*. But if a ſhip, within a day or two after her departure, become leaky and founder at ſea, or be obliged to put back, without any viſible or adequate cauſe to produce ſuch an effect, the natural preſumption is, that ſhe was not ſea-worthy when ſhe ſailed; and it will then be incumbent on the inſured to ſhew the ſtate ſhe was in at that time.

It is ſufficient if the ſhip be ſea-worthy at her departure.

But if a defect appear ſoon after her ſailing, without any viſible cauſe, the inference is, that ſhe was not ſea-worthy when ſhe ſailed.

It is unneceſſary to make any *repreſentation* of the condition of the ſhip to the inſurer, previous to the effecting of the policy; for it is a rule that no repreſentation need be made of matters relating to the riſk which are covered by a warranty (*b*).

It is unneceſſary to make any previous *repreſentation* of the ſtate of the ſhip.

But a ſhip, to be ſea-worthy, muſt not only be tight, ſtaunch, and ſtrong, and provided with all neceſſary ſtores for the voyage propoſed; it is, as has been already obſerved, a condition or warranty, implied in the contract, that the ſhip ſhall be properly *manned*, by perſons of competent ſkill and ability to navigate her. And therefore, if ſhe be ſuffered to ſail in a river, or other place of difficult navigation, without a pilot properly qualified, the underwriters will be diſcharged; for this is a breach of the above condition.

To be ſea-worthy, the ſhip muſt be properly *manned*.

Thus: A ſhip inſured from *Stettin* to *London*, took a pilot on board at *Orfordneſs*, on entering the *Thames*, who quitted her at *Halfway Reach*; after which, and before ſhe came to her moorings higher up the river, ſhe ſtruck upon a ſhip's anchor, which entered her bottom, in conſequence of which ſhe ſunk and filled with water before ſhe had been moored twenty-four hours.—In an action on

A ſhip takes a pilot on her entrance into the *Thames*, but he is permitted to leave her before ſhe is ſafely moored, and an accident afterwards happens: The inſurers are diſcharged, though it do not appear that the loſs was directly imputable to any want of ſkill

(*a*) Vid. *Kain* v. *Hall*, 1 Term Rep. 364.—(*b*) Per Cur. *Shoolbred* v. *Nott*, 1 Term Rep. 354.

in those who navigated the veſſel.

Law v. *Hollingworth*, 7 T. R. 160.

the policy, the plaintiff obtained a verdict, and upon a motion to ſet this verdict aſide, and enter a nonſuit, it was objected that there was actual negligence in the management of the ſhip, by not keeping the pilot on board till ſhe had been moored in ſafety.—Upon this ground the court were clearly of opinion that the underwriters were diſcharged.—Lord *Kenyon* ſaid,—"The principle upon which this caſe muſt be determined, ſeems to be admitted on all hands, namely, that the inſured cannot recover on a policy of inſurance unleſs the ſhip be equipped with every thing neceſſary to her navigation during her voyage. She muſt be ſea-worthy, ſhe muſt have a ſufficient crew, and a captain and pilot of competent ſkill. But in this caſe the captain did not perform his duty; for he had no pilot on board when the accident happened. If the underwriters had been previouſly informed that there would be no pilot on board during a great part of the ſhip's paſſage up the river, probably they would not have undertaken the riſk. On the ground, therefore, that there was no pilot on board when the accident happened, I am of opinion that there muſt be judgment of nonſuit."

Sect. 2.

Of changing the Ship.

The ſhip mentioned in the policy cannot be changed unleſs through neceſſity, or with the leave of the inſurers.

WE have already had occaſion to obſerve that, in almoſt all caſes of inſurance upon goods, it is neceſſary to ſpecify in the policy the ſhip in which they are to be tranſported. Without having this aſcertained, the underwriter would be unable to form a juſt eſtimate of the riſk he is to run (*a*). It is therefore, in general, a part of the contract, that the adventure ſhall be on board the

(*a*) Vid. *Roc.* h. t. n. 28. *Santerna*, h. t. p. 3, n. 35, *Stracca*, glo. 8, n. 10, vid. ſup. 220.

very

very ſhip ſo ſpecified, and no other. And if, before the commencement of the voyage, another ſhip be ſubſtituted for the one mentioned in the policy, or if, during the voyage, the goods inſured be removed into another ſhip, without any *neceſſity*, and without the conſent of the inſurers, the underwriter is diſcharged (*a*)

Some authors have thought that the underwriters are not diſcharged by a change of the ſhip, even without neceſſity, or the conſent of the inſurers, unleſs the new ſhip be worſe than that mentioned in the policy (*b*). So that if the goods inſured be removed to as good a ſhip, the underwriters will remain liable. Others doubt this doctrine (*c*). But with us, the nature and form of the contract entitle the underwriters to ſay that they had more confidence in the ſhip named in the policy, than in any other; and that, therefore, they cannot be bound to run the riſk in another, though a larger and better ſhip, without their conſent, or without neceſſity. Such alſo is the law of *France* on this point (*d*).

Molloy, however, ſeems to think that the naming of the ſhip in the policy amounts to an abſolute warranty, and that if the goods be removed to any other ſhip, though from *neceſſity*, the inſurer is diſcharged, unleſs there be a clauſe in the policy to warrant ſuch removal (*e*). But this is too rigid a conſtruction of the terms of the policy, and contrary to the conſtant practice of all commercial countries (*f*). At preſent no ſuch clauſe as that mentioned by *Molloy* is ever found in the policies of any country; and this, of itſelf, is a ſufficient proof that the liberty of changing the ſhip, in a caſe of neceſſity, does not require a ſpecial clauſe to warrant it.

It is not neceſſary to have a clauſe in the policy to enable the inſured to change the ſhip in caſe of neceſſity.

Lord *Mansfield*, in delivering the opinion of the court in the caſe of *Pelly* v. *Royal Ex. Aſſ.* (*g*) ſays,—"One ob-

(*a*) *La Guidon*, ch. 9, art. 4. *Roccus*, n. 9, *Emerig.* tom. 1. p. 423. *Valin*, art. 26, h. t. *Conſol. del mare*, ch. 87, & 89. *Mal.* lex merc. 118.—(*b*) *Roccus*, n. 57. *Straccha* de naut. art. 3, n. 10. *Caſaregis* diſc. 1, n. 33.—(*c*) Vid. *Emerig.* tom. 1. p. 424.—(*d*) *Emerig.* tom. 1. p. 425.—(*e*) *Molloy*, b. 2, c. 7, § 11.—(*f*) Vid *Mal.* lex merc. 118.—(*g*) 1 *Bur.* 351.

jection was made, by comparing this case to that of changing the ship or bottom on board of which goods are insured; which the insured have no right to do. Answer: There, the *identical ship is essential*; for that is the thing insured. But that case is not like the present." Perhaps it may be inferred from this, that Lord *Mansfield* meant to lay it down as a rule, without any exception, that the ship can in no case be changed. The reporter does not state the objection alluded to by his lordship; and the answer in which he is stated to have said, 'that the identical ship is the thing insured,' shews that the reporter must have misapprehended him. But, be that as it may, his lordship could only mean to lay down the *general rule*, without stating those exceptions arising from necessity, which the general scope of his argument seems strongly to warrant.

A man insures on any ship he shall come in from A. to B. interest or no interest. The ship he sails in springs a leak, he removes to another, and arrives safe; but the first ship is taken: The insurer is liable.

Dick v. *Burrell*, at N. P. 2 *Str.* 1248.

Yet, where a man insured, "interest or no interest, and "*any ship he should come in*, from *Virginia* to *London*, beginning the adventure on his embarking on board such "ship; the money to be paid, though his person should "escape, or the ship be retaken."—He embarked on board the *Speedwell*; but, the ship springing a leak at sea, he went on board the *Friendship*, and arrived safe in *London*; but the *Speedwell* was taken after he left her.—Lord C. J. *Lee* held that the underwriter was liable.—"For," said he, "the insurance is on the ship the insured set out in: *And had that got safe home* and the other been lost, he could not have recovered upon the ground of having removed his person into that ship in the middle of the voyage."

Observations on this decision.

On a first view of this case, an inference seems to arise from it, that even necessity will not warrant the changing of the ship. But it is to be observed, that the ground of the decision is expressly stated to have been, that the insurance was on the *ship the insured first sailed in*, and not on his *person*. Besides, for any thing that appears, the necessity was not great enough to warrant his leaving the *Speedwell*. But, be that as it may, this is but a loose note of a case at *nisi prius*, and is by no means sufficient to establish a principle contrary to constant practice and

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the usage of other countries, and which might be extremely injurious to the interests of commerce.

This point, however, is now clearly settled in the following case, in which it was determined that the shifting of the goods insured from one ship to another, does not discharge the insurer, if this be done from necessity; and that the captain may even dispose of goods saved from shipwreck, and invest the proceeds in the produce of a foreign country, and these being laden on board another ship, will still be protected by the policy.

But the ship may not only be changed from necessity, but the proceeds of goods saved from shipwreck may be invested in new goods; and the risk will continue on these in a new ship.

An insurance was made on the ship *Duras*, "At and "from *Marseilles* to *Madeira*, the *Cape*, Isles of *France* "and *Bourbon*, and to all places in the *East Indies*, from "place to place, during her stay and trade there, and "till her return back to *France*, upon any kind of goods "and also on the ship."—The plaintiffs were interested in bullion and other goods on board, consigned to their correspondents at *Pondicherry*, with directions to barter or sell the same on their account, and to make the returns to *Europe* in other goods, the produce of *India*.—On the outward voyage the *Duras* was lost at the *Isles of France*. Great part of the bullion, and a considerable part of the goods were saved, but damaged. These, without any authority from the underwriters, were sent forward in another ship to *Pondicherry*, where they were disposed of by the plaintiff's correspondents, who invested the produce in *Indian* goods, and shipped them, on the plaintiffs account, on board the *Père de Famille*, for *France*.—This ship sailed from *Pondicherry* in *August* 1778; but in her voyage home, was condemned, at the *Isles of France*, as unfit to proceed to *Europe*; whereupon the goods were put on board the *Louise*, bound for *France*, which ship was taken by an *English* privateer and condemned. On the 29th of *August* 1778, several underwriters on the policy signed a memorandum thereon, whereby they agreed to run the risk on the goods saved in any other ship or ships till their safe arrival in *France*: But the defendant and several other underwriters refused to sign this agreement.—The defendant paid into court the whole of the average loss occasioned by the loss of the *Duras*. By the loss

An insurance is made on any kind of goods, and on the ship, from *France* to the *East Indies*, and back to *France*. The ship being lost in the outward voyage, part of the goods are saved and sent in another ship to *India*, and the produce thereof converted into goods there and sent for *France* in another ship, which being disabled, they are put on board a third ship, which is captured.—The risk on the goods saved in the second ship, and also on the goods on the homeward voyage continues; and the insurers are liable for the loss.

Plantamour v. *Staples*, M. 22 *G.* III. B. R. MS. 1 T. R. 611, n.

loſs of the *Louiſe*, the plaintiffs ſuſtained a loſs of 12 *per cent.* on the ſum ſubſcribed; which was paid by the underwriters who ſigned the memorandum, but refuſed by the reſt, and to recover which this action was brought.—The court, upon the above caſe, were clearly of opinion that the plaintiffs were intitled to recover. Lord *Mansfield* ſaid,—"The only queſtion is, whether the ſhipping of the goods to *Europe* was neceſſary to the ſalvage. It is admitted that the defendant is liable upon the voyage to *Pondicherry*, *though the goods were conveyed in another ſhip*; therefore that circumſtance makes no difference. The ſale of the cargo is alſo admitted to have been neceſſary. Then, how were the proceeds to be remitted to *Europe?* What was the beſt way of getting home the money for the benefit of the inſured and inſurers? Beyond all doubt the beſt way was to inveſt it in other goods. Therefore, that being done, which was the beſt which could be done, the underwriters are liable."—Mr. Juſtice *Buller* ſaid,—"There is no caſe that expreſsly decides that the captain may inveſt the produce of the goods ſaved, in other goods. But in *Mills* v. *Fletcher* (*a*), it was decided that the captain has a general power, and is bound in duty, to do the beſt for all concerned: And what was done in this caſe was manifeſtly for their intereſt."

When the beſt is done that can be done for the intereſt of all parties, the underwriters remain liable.

If, in the courſe of the voyage, the ſhip be diſabled, by ſtreſs of weather, or any other peril of the ſea, the captain ought to hire another veſſel for the tranſport of the goods, and proceed on the voyage, if, under all the circumſtances of his ſituation, it be for the intereſt of all concerned that he ſhould do ſo (*b*).

The captain ought to hire another ſhip, if it be for the intereſt of all concerned that he ſhould do ſo.

In

(*a*) *Doug.* 219, inf. c. 14, § 2.—(*b*) By the *Rhodian* law, (ff. l. 10, § 1,) the captain is releaſed from all his engagements if the ſhip, by the perils of the ſea, and without any fault on his part, become incapable of proceeding on her voyage. *Vinnius* (p. 295,) ſays that the captain, in ſuch caſe, is not obliged to ſeek another veſſel. *Non cogitur aliam quærere navem, quia de certe nave actum eſt.* The laws of *Oleron*, (art. 4,) and

In such case the insurers shall pay all average losses on the goods, the expence of salvage, unloading, warehousing, and reloading, together with all duties that may have been paid, and the increase of freight, if any. In short, they must bear every expence which is the necessary consequence of changing the ship (*a*).

To what expences the underwriters are liable in such case.

Sect. 3.

Of the Insurance of Goods on board of Ship or Ships.

In the foregoing section it has been shewn, that by specifying the ship or vessel in which the goods insured are to be transported, it becomes a part of the contract that the adventure shall be on board the very ship or vessel so specified; and that no other can be substituted in her place, unless from necessity, or with the consent of the underwriters (*b*).

In policies on goods, the ship is generally specified.

It frequently happens, however, particularly in time of war, that merchants have goods in distant countries,

But they may be insured on board *any ship or ships.*

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and those of *Wisbuy* (art. 16, 37, 55), say that the captain *may hire* another ship. The law of *France* (ord. mar. tit. *du fret.* art. 11.) declares that if the ship be disabled, and the captain cannot get her repaired, *he shall be obliged to hire another immediately*, if he can procure one.—*Pothier* (des chartes parties n. 68), and *Valin*, (tit. du fret, art. 11, vol. 1, p. 618,) say that this means only that the captain is bound to hire another vessel, if he would earn his whole freight. *Emerigon* (vol. 1, p. 428) holds that the captain being the agent, not only of the owners of the ship, but also of the shippers of the goods, is bound, in the absence of both, to use his best endeavours to preserve the goods and to do all that, in his circumstances, he thinks will most conduce to the interest of all concerned.—In his quality of captain, he has the entire care of the ship and cargo, and is answerable for both. As to the goods, he is bound to do with them, what it may be presumed the shippers would do, were they present. This seems to be the wisest and best rule, and that which Lord *Mansfield* laid down in the above case of *Plantamour* v. *Staples*, sup. 377.—(*a*) *Emerig.* tom. 1, p. 432, 576, 681.—(*b*) Vid. sup. 220.

which

which they mean to import from thence, but know not by what ſhips they may be ſent, and their agents are often glad to avail themſelves of the firſt that offer for that purpoſe. In ſuch caſes, it is of great importance that the owners of ſuch goods ſhould be at liberty to inſure them, without ſpecifying the ſhips or veſſels they may be ſhipped on board of,—and then the form of the policy is, upon ſuch goods, '*on board any ſhip or ſhips*;' and this mode of inſuring is ſo well eſtabliſhed, both by uſage and authority, that the legality of it is now become indiſputable (*a*).

If two policies be made, for different ſums, on goods in *ſhip or ſhips*, and the goods be put on board two ſhips, and one is loſt; whether the underwriters on both policies ſhall contribute.

If two inſurances, for different ſums, be made, each on goods on board *ſhip or ſhips*, on behalf of the ſame perſon, and for the ſame voyage; and goods amounting to the value in both policies, but in different proportions, be put on board two ſhips, which ſail on the voyage inſured; and nothing be done to appropriate either policy to the goods on board of either ſhip, and one of them be loſt, it would ſeem that this ought to be conſidered as but one inſurance on the entire goods, by two policies, and that the underwriters on both ought to contribute to the loſs.

But otherwiſe if each policy be appropriated to the goods in a particular ſhip.

But the following determination will ſhew that if, in ſuch caſe, the inſured appropriate each policy to certain ſpecific goods on board the reſpective ſhips they may be ſent by, and one be loſt, the underwriters on the policy appropriated to the goods on board of that ſhip, ſhall be alone anſwerable.

Two policies, the one for 6000*l.* and the other for 4000*l.* are made on goods on board *ſhip or ſhips*, on the ſame voyage; and goods to the amount of both policies are put on board two ſhips, though not in thoſe proportions, but it is declared that one is to be covered by the 6000*l.* policy.—This ſhip being

The plaintiff in *India* wrote to his correſpondent in *England* to get two inſurances effected on his account; one for 6000*l.* on goods on board *any ſhip or ſhips* which ſhould ſail from *Bengal* to *London* between the firſt of *November* 1780, and the firſt of *July* 1781, the other for 4000*l.* on goods on board *any ſhip or ſhips*, which ſhould ſail on the ſame voyage, between the firſt of *February* and the 31ſt of *December* 1780. The two inſurances were accordingly effected, and the plaintiff loaded goods to the amount of 4889*l.* on board the *General*

(*a*) Vid. *Kewley* v. *Ryan*, 2 H. Bl. 343. ſup. 231, inf. 382. *Emerig.* tom. 1. p. 173.

Barker,

Barker, and to the amount of 4500 l. on board the *Ganges*, and entered a certificate before the chief justice in *Bengal*, that he had put such goods on board the one, and such on board the other; and that he had shipped on board the *General Barker* (*q*) 4889 l. of the risk intended to be covered by the 6000 l. policy.—Both ships sailed within the time mentioned in the first policy. The *Ganges* arrived safe, but the *General Barker* was lost.—The plaintiff brought an action on the policy for 6000 l. which he contended he had a right to apply to the *General Barker*, and went for a total loss.—At the trial two objections were made: 1st. That no evidence could be given of the declaration made by the plaintiff in *India*; 2dly. That there ought to be a contribution, and all the underwriters on both policies called upon as for an average loss; and that the plaintiff ought only to recover in the proportion of 4889 l. to 4500 l. or, at most, as 4889 l. is to 1111 l.—Lord *Mansfield*, who tried the cause, overruled the objection as to the evidence, and admitted the declaration in *Bengal* to be read, and was of opinion that by it the plaintiff had fixed the application of the 6000 l. policy entirely to the *General Barker*, and a verdict was found accordingly.—Upon a motion for a new trial, the court held that plaintiff had a right to apply the 6000 l. policy to the *General Barker*; but ordered 1111 l. to be deducted out of the 6000 l. for what had been saved.—The plaintiff therefore recovered 4889 l. the value of the goods put on board that ship.

So, if two distinct insurances be made on goods for the same person, and the same voyage, the one on board a specific ship, the other on board *any ship or ships*, and the former arrive safe, but the latter is lost, the insured shall apply the policy on the goods on board *ship or ships* to the goods lost.

loft, the insured shall recover on the 6000 l. policy only.

Henchman v. *Offley*, M. 23 *G.* III. B. R. MS. S. C. 2 H. Bl. 345. n.

A declaration made before a magistrate in *India*, that a particular cargo shall be covered by a particular policy, may be read in evidence here.

If two policies on goods be made on the same voyage, the one on a particular ship, and the other in *ship or ships*, and the latter be loft, the latter policy shall be applied to the goods loft.

(*q*) In the note of this case in 2 H. Bl. 345, the *Ganges* is here put for the *General Barker*, which is contrary to my note of the case, and obviously contrary to the fact.

Thus:

Kewley v. Ryan, 2 H. Bl. 343.

Thus:—*Freeland* and *Rigby* at *St. Vincents* wrote to the plaintiffs at *Liverpool* to get 1260 l. insured on 70 bales of cotton, *on board the Elizabeth*, from *Grenada* to *England*; and also 1300 l. on cotton which they intended to send by *some other ship* that would sail by the first convoy, and directed this to be insured by *ship or ships*.—The plaintiff accordingly got 1260 l. insured in *London*, on goods on board the *Elizabeth*; and also 1300 l. on goods on board *ship or ships*, viz. 700 l. at *Liverpool*, and 600 l. in *London*. The policy for 700 l. on which this action was brought, was, "At and from *Grenada* to *Liverpool*, "on any kind of goods as interest should appear, in "*ship or ships*, on account of *Freeland* and *Rigby*, war- "ranted to sail on or before the 1st of *August* 1793, and "return 3 *per cent.* if the ship sailed with convoy, and "arrived; without any exception of the goods on board "the *Elizabeth*." The policy for 600 l. effected in *London*, was also *on ship or ships*; at and from *Grenada* to *Liverpool*, but with an exception of 1260 l. "on 70 bales "of cotton *per Elizabeth*," the same underwriters in *London* having before subscribed the policy on the *Elizabeth*. But the plaintiffs did not communicate to the underwriters at *Liverpool*, the letter of *Freeland* and *Rigby* directing an insurance on the *Elizabeth*, nor any circumstance respecting the goods shipped on board the *Elizabeth*, and the insurance made on that ship.—The *Elizabeth* arrived safe at *Liverpool*. The *Heart of Oak*, on board of which the second cargo was shipped, was totally lost in the voyage.—The defendant conceiving that he had a right to apply the policy for 709 l. *on ship or ships*, to the goods on board the *Elizabeth*, paid 3 *per cent.* into court on account of her having sailed with convoy and arrived. —The plaintiff recovered a verdict for the full amount of the defendant's subscription, including the money paid into court.—Upon a motion for a new trial, it was contended, on the part of the defendant, *first*, that a policy on *ship or ships* was not a legal policy; and *secondly*, that, as a ship answering the description in the policy, arrived safe, having the full amount of the sum insured, the

property

property of *Freeland* and *Rigby*, on board, the policy was ſatisfied. And as every circumſtance reſpecting the ſpecific inſurance on the *Elizabeth* had been concealed from the defendant, it was the ſame, with regard to him, as if no ſuch inſurance had been made on that ſhip. For if the *Elizabeth* had been loſt and the *Heart of Oak* had arrived ſafe, the policy might, by ſuppreſſing the letter from *Freeland* and *Rigby*, have charged the defendant with that loſs.—But the court were unanimouſly of opinion, *firſt*, that the legality of the policy on *ſhip or ſhips*, was too well eſtabliſhed, both by uſage and authority, to be diſputed; and *ſecondly*, that the inſured had clearly a right to apply, upon the authority of the foregoing caſe of *Henchman* v. *Offley*, ſuch an inſurance to whatever ſhip he thought proper within the terms of it.

By the law of *France*, if an inſurance be made *ſeparately* on goods on board ſeveral ſhips named, and the whole are laden on board one ſhip; the inſurer will run only the riſk on the ſum which he had inſured on board that one ſhip, although all the ſhips are loſt; and he ſhall return the premium on all but that one, deducting one half *per cent* (*a*).

If a certain ſum be inſured on goods on board *ſhip or ſhips*; and goods to a much larger amount be put on board ſeveral ſhips, of which ſome arrive ſafe, and the reſt are loſt; what proportion of the loſs the inſurers ſhall bear.

Emerigon (*b*) reports the following deciſion on this ſubject.—An inſurance for 13,000 livres was made on goods on board the *Amphitrite*, from *Marſeilles* to the *French Weſt India Iſlands*; and from the *French Weſt India Iſlands* to *Marſeilles* or other ports in *France*, upon goods and merchandizes to be laden on board *any French ſhip or ſhips* (*c*).—The *Amphitrite* arrived ſafe in the *Weſt Indies*, where the captain loaded goods on board five different ſhips, in different quantities, to the amount of 25,632 livres. Three of the ſhips arrived ſafe, but the other two, with goods on board to the value of 15,259 livres, were taken by the *Engliſh*.—The inſured inſiſted that the 13,000 livres inſured ſhould be conſidered as part of the 25,632 livres laden on board the five ſhips, and that the inſurers ſhould be condemned to pay the loſs, by the rule of pro-

(*a*) Vid. ord. mar. b. 1. art. 32. *Valin* ib. *Pothier*, h. t. n. 68. *Le Guidon*, ch. 13. *Emerig.* tom. 1, p. 176.—(*b*) Tom. 1. p. 174.—(*c*) *In quovis*, dans un ou pluſieurs bâtimens *Francois*, quels qu'ils puiſſent être.

portion,

portion, upon the total.—The inſurers inſiſted that the value of the goods which arrived ſafe was more than the ſum inſured; and therefore the policy was ſatisfied.—The inſured replied, that the goods on board the five ſhips formed one entire maſs, conſiſting of what was inſured, and what was not covered by the policy, and therefore the inſurers ſhould pay the loſs by the rule of proportion.—The inſurers were condemned to pay 54 *per cent.* on the ſum inſured; but upon what principle is not ſtated:—The proportion which 15,259 bear to 25,832 is nearly 59 *per cent.*: So that, if the rule inſiſted upon by the inſured was meant to be adopted by the court, there muſt have been a miſcalculation in fixing the loſs at 54 *per cent.*

If goods be inſured on board of ſeveral ſhips, by ſeperate policies, the riſk to begin from the goods leaving the ſhore, and the goods are all ſent in one veſſel to be put on board the ſeveral ſhips, and this veſſel be loſt; to what extent the inſurers are liable.

Le Guidon (*a*) puts this caſe.—A merchant intending to export a quantity of goods in ſeveral ſhips, makes an inſurance on each, and ſends the whole in a veſſel from *Rouen* to *Havre*, to be put on board the different ſhips, and this veſſel is loſt in its paſſage.—The queſtion he makes is, whether the words in the policy, "*courront riſque* "*en barques, heus, ou bateaux, qui porteront les dites mar-* "*chandiſes à bord,*" ſhall bind the inſurers to pay the ſeveral ſums inſured on each ſhip.—He thinks the inſurers liable only for the greateſt ſum inſured on any of the ſhips.—*Valin* (*b*) is not of that opinion. "It is ſufficient," ſays he, "that it was intended to divide the goods amongſt the different ſhips, according to the terms of the inſurance, to make the loſs fall on the inſurers; for they muſt at length be carried on board each of the ſhips; and their being put on board a ſingle bark is of little conſequence."—*Emerigon* (*c*) on the contrary, thinks that it is of great conſequence to the inſurer, who has taken upon him the riſk of the goods on board ſeveral veſſels, that they ſhould not be confined to one; and that neither the inſured nor his captain has a right to make the condition of the inſurer more perilous, by uniting all the riſks into one, which, by the contract, ought to be divided. He concludes, however, by obſerving, that if ever the caſe ſhould happen, *Valin*'s opinion ought to be followed.

(*a*) Ch. 13, art. 1.—(*b*) Sur. art. 32. h. t. p. 79.—(*c*) Tom. 1, p. 177, 178.

Sect.

Sect. 4.

Of the Conduct of the Ship.

ANOTHER implied condition relative to the ſhip is, that ſhe ſhall be navigated, conducted, and managed according to law; that is, not only according to the municipal law, and the law of nations, but alſo according to the particular treaties ſubſiſting between the country to which ſhe belongs and other ſtates (*a*).

The ſhip muſt be conducted and navigated according to law.

The ſhip muſt, therefore, not only be engaged in a legal trade, but ſhe muſt carry it on in a legal manner. If the captain be under any legal diſability or diſqualification, the ſhip ſhall not be deemed to be navigated according to law; and an inſurance on ſuch ſhip will be void.

If the captain be under any legal diſability, the inſurance will be void.

By the ſtatute for regulating the ſlave trade (*b*), it is enacted "that it ſhall not be lawful for any perſon to become a maſter of any ſhip at the time ſhe ſhall clear out from any port of *Great Britain*, in the *African* ſlave trade, unleſs ſuch maſter ſhall make oath, and deliver in to the collector of the cuſtoms, at the port where ſuch ſhip ſhall clear out, a certificate atteſted *by the reſpective owner or owners*, that he has already ſerved in ſuch capacity during one voyage, or as chief mate or ſurgeon during two voyages, or as chief or other mate during three voyages, in the ſlave trade; upon pain that the maſter, and alſo the owners who employ him, ſhall, for every ſuch offence reſpectively, forfeit 500l."

By 31 *G.* III. c. 54, § 7, the maſter of every ſhip in the ſlave trade ſhall make oath, and deliver to the collector of the port, a certificate, atteſted by the reſpective owner or owners, that he has already been maſter one voyage, or chief mate or ſurgeon two voyages, or any mate three voyages.

In compliance with this act, it is neceſſary in the ſlave trade, that the certificate of the captain's having ſerved as the act requires, ſhould be atteſted by the owner or

This certificate muſt be by the owners whom the maſter has *already ſerved*, and not by the owners of the ſhip in the *intended* voyage.

(*a*) Vid. Lord *Kenyon*'s judgment in *Chriſtie* v. *Secretan*, 8 T. R. 192.—(*b*) Stat. 31 *G.* III. c. 54, § 7, originally to be in force only for a year; but annually continued down to the preſent time.

owners of the ſhip or ſhips *in which ſuch ſervice was performed*; and the following caſe will ſhew that a certificate from the owners in the *intended voyage* will not be ſufficient evidence of a compliance with the directions of the act; and that, though a heavy penalty is impoſed, not only on the maſter who ſerves as ſuch without the the qualification preſcribed, but alſo on the owners for employing him, and though the act does not declare the inſurance on a ſhip, having ſuch a maſter, void, yet the policy was declared void.

The maſter makes oath that he had been two voyages as chief mate, the owner in the *intended voyage* certifies that this is true: This is no evidence of a compliance with the act; and the evidence preſcribed by the act not being produced to ſhew that the ſhip was navigated according to law, the inſured cannot recover for a loſs occaſioned by an inſurrection of the ſlaves.

Farmer v. *Legg*, 7 T. R. 186.

An inſurance was made on the *Cadiz Diſpatch*, engaged in the *African* ſlave trade, "At and from *London* "to *Africa*, during her ſtay there, and from thence to "her port of diſcharge in the *Weſt Indies*."—In an action on this policy, it appeared that the loſs was occaſioned by an inſurrection of the ſlaves.—On the part of the defendant it was objected, that the ſhip had not been navigated in the manner preſcribed by the above act.—It appeared that the captain had made oath that he had been two voyages as chief mate of the *Sally*, in the ſlave trade; and the preſent plaintiff, *the owner in the voyage inſured*, had certified that this was true to the beſt of his knowledge and belief. But it was inſiſted that this was not admiſſible evidence, nor ſufficient proof of a compliance with the directions of the act, which was made to compel the owners of veſſels engaged in this traffic to employ experienced commanders, as one means of inſuring to the ſlaves a more judicious and humane treatment during their paſſage to the *Weſt Indies*: That the ſtatute, by directing the oath and certificate therein mentioned to be depoſited in the hands of the collector of the cuſtoms, had preſcribed the ſpecies of evidence by which alone a compliance with its regulations could be proved, and that the certificate required by the act was a certificate by the reſpective owner or owners during the *former voyages*, and not, as in the preſent caſe, by the owner in the intended voyage.—Lord *Kenyon*, before whom the cauſe was tried, being of opinion that

that the certificate did not anſwer the requiſition of the ſtatute, nonſuited the plaintiff.—A motion being made to ſet aſide this nonſuit and grant a new trial, on the ground of a miſconſtruction of the act of parliament, the court were unanimouſly of opinion that the certificate ought to have been from the owners of the ſhips in which the qualification was obtained, who muſt be beſt acquainted with the fact, and capable of certifying from their own knowledge.

The ſentence of a foreign court of admiralty condemning a ſhip as prize upon the expreſs ground that ſhe had violated a treaty ſubſiſting between the country to which ſhe belonged, and the belligerent by which ſhe is condemned, is concluſive evidence to prove that ſhe had not ſailed according to law, and ſo to diſcharge the underwriters. But the following deciſion will ſhew, that if a neutral ſhip be condemned, *as being enemy's property*, and one of the reaſons aſſigned for this in the ſentence is, that ſhe had not the proper documents required by treaty on board; this ſhall not be concluſive evidence to prove that the ſhip had not ſailed according to law; for the only point which the ſentence profeſſes to *decide* is, that the ſhip was enemy's property.

Though a ſentence of condemnation, on the expreſs ground that the ſhip had violated a treaty, be concluſive to ſhew that ſhe did not ſail according to law; yet, if this be only *recited as a fact*, and the ground of the ſentence be that the ſhip was *enemy's property*, the ſentence will not be concluſive.

An inſurance was made on goods on board the *Peggy*, on a voyage "From *Maryland* and *Virginia*, both or either, "to *Bremen*."—The policy was ſubſcribed on the 31ſt of *May* 1797, and on the 2d of *June* following, the underwriters ſubſcribed a memorandum, written on the policy, in theſe words,—"The deſtination of the *Peggy* having been altered, we agree to ſtand our reſpective riſks in the goods inſured on this policy *per The Mercury*, direct from *Virginia* to *Bremen*."—An action was brought on the policy for a total loſs of the goods on board the *Mercury*, and for expences incurred in a ſuit by the plaintiff for the recovery of the property inſured.—On the trial of the cauſe it appeared, that the *Mercury* was, in fact, an *American* ſhip, and had on board, at the time of her capture, all ſuch papers and documents as are uſually carried on board *American* ſhips, or which the

An *American* ſhip is captured by the *French*, and condemned as prize becauſe ſhe was *looked upon as belonging to the enemy*. Among other reaſons ſtated in the ſentence from which this concluſion is drawn, it is recited as a fact, that the ſhip had not all the papers required by the treaty between *France* and *America*. The ground of this ſentence being that the ſhip and cargo were *enemy's property*, it is not concluſive

evidence to prove that the ſhip had acted in contravention of the treaty.

Chriſtie v. *Secretan*, 8 T. R. 192. ſup. 300.

French themſelves deemed neceſſary in former voyages. There was alſo a muſter-roll on board, but not ſigned or certified by any public officer of the place from which the ſhip ſailed.—No warranty was made to any of the underwriters on the ſubject: On the contrary, the broker, though he ſpoke of the ſhip as an *American*, told the underwriters that he was directed not to warrant any thing.—On the 20th of *May* 1797, the ſhip ſailed with the goods on board from *Virginia* on the voyage inſured, and on the 22d of *June* following was captured by a *French* privateer, and taken into *Nantz*.—The proceedings being inſtituted before the commercial tribunal there, the following ſentence was pronounced by that court.—"Conſidering that the 4th article of the decree of the 3d *Brumaire*, 4th year, declares good prize, All *American* ſhips *which ſhall not have on board a muſter-roll in due form, ſuch as is preſcribed by the form annexed to the treaty of the 6th of February* 1778; and that the muſter-roll of the ſhip *Mercury* is not conformable to that form, or to that ordered by the decree of the *Directory* of the 12th *Ventoſe*, 4th year, it being neither dated or ſigned by any public officer of the *United States*: Conſidering that the bill of lading of 255 hogſheads of tobacco found on board, was not ſigned by the captain, is contrary to the 9th article of the marine ordonances, whereby it is declared, that all veſſels on board whereof no charter-party, bills of lading, or invoices, are found, ſhall be decreed good prize, together with their cargoes, as alſo the 9th regulation of the 21ſt of *October* 1744, declaring all bills of lading not ſigned null and void: Conſidering that there were other goods on board of which there were no bills of lading or invoice; that the captain has produced no *American* protection, and that, it appears that he is an *Iriſhman*, and has a wife and children in *Ireland*—the tribunal, in conformity with the above laws, adjudges and declares the validity of the prize of the ſhip *Mercury*, and of the goods and effects on board, for want of the diſpatches and ſea papers of the captain being in regular order; *on which account*

count ſhe is looked upon as belonging to the enemies of the French *republic*; the ſame being agreeable to the 7th article of the marine ordinances of 1681."—Upon this caſe it was inſiſted on the part of the defendant, that though there was no warranty that the ſhip was *American*, yet, being in fact *American*, ſhe ought to have had all thoſe documents which are neceſſary for the protection of an *American* ſhip, whether required by the law of nations, or particular treaties, the want of which ſubjected her to additional riſks, there being a warranty implied in every contract of inſurance, *that the ſhip ſhall be navigated according to the laws of the country to which ſhe belongs and to which ſhe is going (a)*.—But the court determined that the plaintiff was intitled to recover.—Lord *Kenyon* ſaid, —"In deciding this caſe I do not mean to deny that the ſhip inſured muſt be navigated, not only according to the law of nations, but alſo according to the particular treaties ſubſiſting between the country to which ſhe belongs and other countries.—In general there can be no doubt but that the ſentence of a court of admiralty is concluſive, *as to the points which it profeſſes to decide*. It was ſo ruled in *Hughes* v. *Cornelius (b)*, and that has been acknowledged to be law ever ſince. But the ſentence of ſuch a court *is only concluſive* on the points which profeſſes to decide; and the only queſtion in this caſe is, what point the French court of admiralty has decided. Now the ſentence recites many facts into which it is not neceſſary to enquire *(c)*; but the ſole reaſon given for the adjudication, at the concluding part, does not affect the caſe before us. If the ſhip and cargo had been condemned for having violated any treaty between *France* and

A ſhip inſured muſt be navigated, not only according to the law of nations, but alſo according to the particular treaties ſubſiſting between the country to which ſhe belongs, and other countries.

(a) The authorities cited in ſupport of this propoſition were the caſe of *Law* v. *Hollingworth*, 7 T. R. 160, ſup. 373, and *Farmer* v. *Legg*, 7 T. R. 186. ſup. 386.—*(b)* 2 *Show.* 232.—*(c)* The adjudication muſt be ſuppoſed to be the neceſſary conſequence reſulting from the facts found; and the facts recited in the ſentence muſt have been found by the court, otherwiſe the ſentence of condemnation would have been without foundation.

America, we ſhould not have been able to extricate ourſelves from the effect of ſuch a ſentence. But the ſhort ground on which I proceed in this caſe is, that the condemnation is expreſſed, at the concluſion of it, to be, becauſe "the ſhip belonged to the enemies of the *French* "republic *(a)*." We cannot now enquire whether *France* and *America* were at enmity with each other. The foundation of the ſentence is that the ſhip belonged to the enemies of the *French* republic, and not becauſe the ſhip had not the proper documents on board. Mr. Juſtice *Groſe* ſaid,—"I agree that it was neceſſary for this ſhip to have on board all thoſe documents that an *American* ſhip ought to have; and that the want of them would have diſcharged the underwriter. Now the ſentence does not proceed on the want of any ſuch documents, but on the expreſs ground that the ſhip belonged to the enemies of the *French* republic. We can only look to the foundation of the ſentence, and not to the previous reaſons there ſtated."—Mr. Juſtice *Lawrence* ſaid,—"In the courſe of the argument, many things, I think, were taken for granted, to which I cannot aſſent. Among others, it was ſaid, that the ſhip inſured muſt be navigated according to the laws of the countries from and to which ſhe ſails: But that propoſition, I rather think is not ſupported, in its extent, by the caſes. It is true that if the inſured bring an action here on a policy of inſurance, effected contrary to the law of this country, he cannot recover: But I do not know that the caſes have gone the length of deciding that no action can be maintained here on a policy made contrary to the revenue laws of another country *(b)*. I doubt alſo whether there be any analogy between

Whether the ſhip inſured muſt be navigated according to the laws, both of the country to which ſhe belongs, and of that to which ſhe is bound.

(*a*) The words of the ſentence, as tranſlated in the report, are; "On which account ſhe is *looked upon* as belonging to the enemies of the *French* republic."—(*b*) The caſes of *Holman* v. *Johnſon Cowp.* 341, and *Biggs* v. *Lawrence*, 3 T. R. 454, ſhew that a contract is not deemed void by the law of *England*, merely becauſe it is made in contravention of the revenue laws of a foreign ſtate; and in the caſe of *Lever* v. *Fletcher*, ſup. 54, Lord *Mansfield*

between a caſe like the preſent and caſes where there is an implied warranty of ſea-worthineſs. The latter is implied from the nature of the contract. But that is not the caſe of a ſhip wanting the proper documents on board. She may, nevertheleſs, perform her voyage; at leaſt there is no certainty that ſhe will not, as there is in the other caſes alluded to. I have merely thrown out theſe doubts in conſequence of what fell from the counſel in the argument, without meaning to give any deciſive opinion upon theſe points. It has been contended, however, on the part of the defendant, that the ſhip in queſtion was condemned for not having on board thoſe papers that are required by the treaty between *France* and *America*; and if that had been the expreſs ground of the ſentence, I ſhould have found great difficulty in reſiſting its effect, as applied to this action: But that is not the ground of their deciſion. They have ſtated, indeed, many things that induced them to draw the concluſion *that ſhe was the property of an enemy*; but that is the ground of the ſentence. We muſt conſider the ſentence as concluſive on that point, without examining the premiſes that led to that concluſion."

Mansfield ſays, that no country pays attention to the revenue laws of another; and he lays it down as law, that if an inſurer enter into the contract, with full knowledge that the inſurance is meant to protect a ſmuggling trade with a foreign country, then it is a fair contract as between the parties.—See ch. 3, § 1, When this ſubject is fully conſidered.

CHAP. XII.

Of Deviation.

BY deviation is here meant a voluntary departure, without any neceſſity, from the uſual courſe of the voyage inſured. From the moment this happens, the voyage is changed, the contract is determined, and the inſurer is diſcharged from all ſubſequent reſponſibility. By the terms of the contract, the inſurer only runs the riſk of the voyage agreed upon, and of no other; and it is therefore a condition neceſſarily implied in the policy, that the ſhip ſhall proceed by the ſhorteſt and ſafeſt courſe to her port of deſtination, and on no account to deviate from that courſe, but in caſes of neceſſity (*a*).

We will conſider the ſubject of deviation under the two following heads;

1. What ſhall amount to a deviation that will diſcharge the inſurers;

2. What are the caſes of neceſſity that will juſtify a deviation.

Sect. 1.

What ſhall amount to a Deviation that will diſcharge the Inſurers.

The courſe of the voyage does not mean the neareſt poſſible way, but the uſual and regular courſe. Stopping at certain places in the voyage, is no deviation, if it be cuſtomary to do ſo.

By the courſe of the voyage is not meant *the ſhorteſt poſſible way* from the port of departure to the port of deſtination; but the regular and cuſtomary track, if ſuch there be, which long uſage has proved to be the ſafeſt and moſt convenient. And therefore the ſtopping at certain places in the courſe of a voyage, though out of the direct line, is not a deviation, but a part of the voyage, if it has been the uſual and ſettled practice, to

(*a*) Periculum intelligitur ſolum currere aſſecurator, pro illo itinere convento, et non pro alio. Nam ſi navis mutaverit iter, vel a viâ rectâ illius itineris diverterit, non tenetur amplices aſſecurator. *Roccus*, n. 52. Vid. *Emerig.* tom. 2, p. 5. *Doug.* 278.

ſtop

ſtop at thoſe places. For whatever is uſually done, is preſumed to be foreſeen, and to be in the contemplation of the parties, and is therefore underſtood to be referred to by every policy, and to make a part of it as much as if it were expreſſed *(a)*.

But evidence of a few inſtances will not be ſufficient to eſtabliſh ſuch an uſage. It can only be ſupported by long and regular practice. And therefore, if a ſhip, in a voyage from *Liverpool* to *Jamaica*, put into the *Iſle of Man*; and ſome inſtances appear of ſhips, in this voyage, putting in there; but no regular or ſettled practice to do ſo appear: This will not excuſe the deviation; but the inſurers will be diſcharged *(b)*.

But a few inſtances will no make ſuch an uſage.

The effect of a deviation is not to *vitiate or avoid* the policy, but only to determine it from the time of the deviation, and to diſcharge the inſurer from all ſubſequent reſponſibility. If, therefore, a ſhip, after her departure, receive damage, then deviate, and is afterwards loſt; though the inſurer is diſcharged from the time of the deviation, and is not anſwerable for the ſubſequent loſs; yet he is anſwerable for the damage received before the deviation *(c)*. But though he is thus diſcharged from ſubſequent reſponſibility, yet he is intitled to retain the whole premium.

Effect of a deviation.

A perſon unacquainted with the nature of this contract, might, at firſt view, be tempted to think that if, after a deviation, the ſhip reſume her proper courſe, ſtill being in good condition, and capable of performing the voyage, ſuch a deviation ought not to alter the rights of the parties, or deprive the inſured of the benefit of the policy.—But the anſwer is, that the condition implied in the contract, that the ſhip ſhall not deviate without neceſſity, being broken by the inſured, the inſurer is diſcharged. The proper courſe of the voyage being once interrupted,

It determines the contract, though the ſhip reſume her proper courſe, and in a condition to complete the voyage.

(a) Per Lord *Mansfield*, in *Pelly* v. *Roy. Ex. Aſſ.* 1 *Bur.* 348, ſup. 182.—*(b)* Vid. *Bond* v. *Nutt*, *Cowp.* 601, ſup. 255. —*(c)* Per *Holt*, C. J. *Green* v. *Young*, at N. P. 2 Lord *Ray.* 840. 2 *Salk.* 444.

cannot

cannot be reſumed in the eyes of the law. The contract being once diſſolved, cannot be renewed without the conſent of both parties; and if a loſs happen after a deviation, who can ſay that the ſhip would not have arrived ſafe if ſhe had purſued the uſual courſe?

The ſmallneſs of a deviation makes it not the leſs fatal.

The ſhortneſs of the time, or of the diſtance, of a deviation, makes no difference as to its effect on the contract. Whether it be for one hour, or a month; or for one mile or one hundred, the conſequence is the ſame. If it be voluntary, and without neceſſity, it puts an end to the reſponſibility of the inſurer. The true reaſon why a deviation diſcharges the inſurer is, not the increaſe of the riſk, but, that the party contracting has voluntarily ſubſtituted another voyage for that which was inſured (*a*).

A ſhip puts into a port not in the uſual courſe of the voyage, though it lies in her way. This is a deviation.

Therefore, where an inſurance was made on a veſſel "from *Dartmouth* to *Liverpool*;" and the veſſel, in her paſſage from *Dartmouth*, put into *Loo*, a place ſhe muſt of neceſſity paſs by, in the courſe of the voyage inſured: Though no accident befel her in going into, or coming out of *Loo*, but ſhe was loſt after ſhe got out to ſea again; Mr. Juſtice *Yates* held that this was a deviation.

Fox v. *Black*, at N. P. 1767. *Beawes* 315.

S. P. *Townſon* v. *Guyon*, at N. P. *Beawes* 315.

So, where goods were inſured from *Dunkirk* to *Leghorn*; and the ſhip came to *Dover*, in her way, to procure a *Mediterranean* paſs; and being afterwards loſt, Lord *Mansfield*, in an action on the policy, held that the calling at *Dover* was a deviation, which diſcharged the underwriters.

A ſhip having liberty to put into one port, puts into another equally in her way; This is a deviation, and fatal to the contract, though neither the riſk or the premium would have been greater if it had been allowed by the policy.

So, where an inſurance was made at *Glaſgow* on fourteen hogſheads of tobacco, "beginning the adventure "from the loading thereof at *Carron*, and to continue "till the ſhip, (*being allowed a liberty to call at Leith*), "ſhall arrive at *Hull*, and there be ſafely delivered" —The inſtructions of the inſured to the broker directed him to make the inſurance, "with liberty to call *as uſual*," and it was uſual for veſſels ſailing from *Carron*, with goods on freight, to *Hull*, in going down the *Frith* of *Forth*, to touch at different places, to take in or deliver goods; particularly at *Burrowſtowneſs*, and *Leith*, and at *Morri-*

Elliot v. *Wilſon*, 1 Bro. Parl. Ca. 459.

(*a*) Vid. *Lavabre* v. *Wilſon*, ſup. 186.

ſon's

ſon's Haven, ſix miles down the *Frith*, on the ſame ſide with *Leith*. The inſured were not privy to the allowance "*to call at Leith*," being ſubſtituted in the policy for the more general liberty, "*to call as uſual.*" The premium was equal if not higher, than was uſual where the general liberty, to touch at the cuſtomary ports, was allowed. The ſhip ſailed on the 4th of *February* 1774, did not touch at *Leith*, *but put into Morriſon's Haven*, ſailed from thence on the 9th, got ſafe into the direct courſe from *Carron* to *Hull*, and proceeded with a fair wind, till the 10th, when ſhe was overtaken by a ſtorm, wrecked on the coaſt of *Northumberland*, and the cargo totally loſt.—The underwriters on hearing of the loſs, conceiving themſelves liable, wrote orders to have the tobacco preſerved and ſent to *Hull*, promiſing to contribute towards the expence as far as they were intereſted. Aftewards, however, they proteſted againſt the ſhip's having gone into *Morriſon's Haven*, as being a deviation, and refuſed payment of the loſs.—An action was brought by the inſured in *Scotland*, and, after a variety of proceedings in the courts there, which would neither be very intelligible, or very inſtructive, to an *Engliſh* reader, the underwriters were decreed to pay the amount of the loſs. But the Houſe of Lords, upon appeal, reverſed that judgment, being of opinion that a wilful deviation from the due courſe of the voyage inſured, is, in all caſes, a determination of the policy: And that it is immaterial from what cauſe, or at what place, a ſubſequent loſs happens; for, from that moment of the deviation the underwriters are diſcharged. That there was, in this caſe, a wilful deviation; and though ſhips ſailing on this voyage, have ſometimes been permitted, by the terms of the policies underwritten at the ſame premium, to go into *Morriſon's Haven*, yet that could not avail in the preſent caſe, ſince here no ſuch permiſſion was given.

If there be ſeveral ports of diſcharge mentioned in the policy, the ſhip muſt go to thoſe places in the order in which they are named, unleſs ſome uſage or particular facts appear to vary the general rule.

If there be ſeveral ports of diſcharge mentioned in the policy, the ſhip muſt go to them in their order.

Thus:

A ſhip is inſured from *A.* to *B.* and from thence to *C.* and *D.* the ports of diſcharge. The ſhip goes to *D.* before *C:* This is a deviation.

Beatſon v. *Haworth*, 6 T. R. 531.

Thus:—An inſurance was made on a ſhip, "At and "from *Fiſherow* to *Gothenburgh*, and back to *Leith* and *Cockenzie*;"—The ſhip performed her voyage outward to *Gothenburgh*, and having taken in goods both for *Leith* and *Cockenzie*, on her return home, without going to *Leith*, ſhe firſt put into *Cockenzie*, where ſhe was ſtranded and loſt.—In an action on the policy, evidence was given to ſhew, that *Leith* was a very ſafe and commodious harbour, and *Cockenzie* a very ſmall and inſecure one, eſpecially in the winter; that the two places are about ten miles from each other; but *Cockenzie* lies neareſt to *Gothenburgh*, and it is about a mile and a half out of the way to put into *Cockenzie*, in going from *Gothenburgh* to *Leith*; that, though there was no ſettled courſe to regulate this voyage, yet it was ſafeſt to go firſt to *Leith*; for, by diſcharging the lading for *Leith*, the riſk of going into *Cockenzie* was much leſſened.—Upon this caſe, the court determined, that as the intended voyage was deſcribed in the policy, and as there was no regular and ſettled courſe, known to all the traders, different from that ſo deſcribed, the ſhip deviated by putting into *Cockenzie* firſt, and conſequently that the plaintiff could not recover.—One of the judges added, that the parties, by inſerting the names of the places contrary to the natural order in which they lay in the ſhip's courſe, ſhewed it to be their *intention* to vary the natural courſe of the voyage.

Though the ports of diſcharge be not ſpecified, yet the ſhip muſt take them in their geographical order, as they occur.

And the following caſe will ſhew, that though the ſhip's ports of diſcharge are only mentioned generally, but not ſpecifically named in the policy, yet the ſhip muſt go to them in the geographical order in which they occur; and taking them out of that order, unleſs this be warranted by uſage, will be a deviation.

A ſhip is inſured from *London* to her ports of diſcharge in the *Streights*, with power in the voyage to ſtop at any places

An inſurance was made on goods, "At and from *Lon-* "*don* to the ſhip's ports of diſcharge in the *Streights* as "high as *Meſſina*; with power in the voyage to ſtop or "ſtay at any ports or places whatſoever."—The ſhip was freighted with lead from *London* to *Marſeilles*, and went into

into *Falmouth*, where ſhe ſtaid three weeks, and took in a freight of tin for the ſame place. Before ſhe went from *London*, the plaintiff, who was owner of the ſhip, declared that ſhe was to go directly to *Genoa*, *Leghorn*, and *Naples*, and there was nothing ſaid about *Marſeilles*. When ſhe was off *Marſeilles*, the wind was againſt her, and ſhe could not then get in, but went to *Genoa*, and from thence to *Leghorn*, and in coming back to *Marſeilles*, ſhe was attacked by a privateer, and blown up.—In an action on the policy, it was proved by ſeveral captains, and ſo held by Lord Chief Juſtice *Lee*, 1ſt, That the going into *Falmouth*, and ſtaying there was a deviation; 2dly, That as ſhe did not ſtop at *Marſeilles*, this was acting contrary to the terms of the policy; for by her ports of diſcharge muſt be underſtood, the ports at which it was intended goods ſhould be delivered, and the firſt of them was *Marſeilles*,—3dly, It was ſworn by ſeveral captains to be their opinion, (but the Chief Juſtice ſaid nothing on this point), that the going no further in the *Streights* than *Leghorn*, and then returning, was a determination of the inſurance at *Leghorn*; and the inſurers diſcharged from the ſubſequent loſs. Upon this there was a verdict for the defendant.

whatſoever; and ſhe goes firſt to *Genoa*, then to *Leghorn*, and laſtly to *Marſeilles*: The voyage ends at *Leghorn*, and the inſurers are diſcharged.

Claſon v. Simmonds, at N. P. cited by Mr. Juſtice *Lawrence*, 6. T. R. 533.

The following deciſion proceeded on the ſame principle.—A ſhip was inſured, "At and from *Liſbon* to a port in *England*, with liberty to call *at any one port in Portugal*, for any purpoſe whatſoever;" and the ſhip ſailed from *Liſbon* to *Faro*, to complete her loading; *Faro* being a port to the ſouthward of *Liſbon*, and therefore quite out of the courſe of the voyage to *England*.—In an action on the policy, Lord *Kenyon* was of opinion that the liberty given by the policy to call at any one port in *Portugal*, muſt be reſtrained to a permiſſion to call at ſome port to the northward of *Liſbon*, in the courſe of the voyage to *England*; and that going to the ſouthward was a deviation which diſcharged the underwriters.

A ſhip is inſured from *Liſbon* to *England*, with liberty to call *at any one port in Portugal*: This gives only a liberty to call at ſome port in *Portugal* in the courſe of the voyage to *England*.

Hogg v. Horner, at N. P. after Mich. 1797. MS.

Yet, if a ſhip be compelled by any neceſſity to change the order of the places to which ſhe is inſured, this is not a deviation.—As where a ſhip was inſured from *Liſbon* to *Madeira*, from thence to *Saffi*, on the coaſt of *Africa*,

Yet if a ſhip be compelled by *neceſſity* to alter the order of the places, this is no deviation.

Driſcol v. *Bevil*, 1 *Bof. & Pul.* 313, ſup. 190.

Africa, and back from thence to *Liſbon*; and upon her arrival at *Madeira*, the crew being alarmed by reports of *Mooriſh* cruiſers being off *Saffi*, quitted the ſhip and refuſed to return to her unleſs the captain would promiſe to ſail immediately back to *Liſbon*. The captain complied; but on his arrival at *Liſbon*, the charterers inſiſted on his proceeding directly to *Saffi*; which he accordingly did, and was captured on his return from *Saffi* to *Liſbon*.—It was determined, that there was no deviation in this caſe, and that the underwriters were liable for the loſs.

The clauſe giving liberty *to touch, ſtay, trade*, &c. muſt always be interpreted as ſubordinate to the voyage inſured.

Clauſes are very frequently introduced into policies, giving liberty to the inſured *to touch, ſtay, trade, &c. at any ports or places*, in the courſe of the voyage; and as theſe clauſes are often inſerted as a matter of courſe, and without much conſideration by either party, it is neceſſary that they ſhould be underſtood with ſuch reſtrictions as the courts in different countries have thought neceſſary to be impoſed on them, in order to prevent any unfair advantage being taken of the general words in which they are uſually expreſſed. They are therefore always interpreted as ſubordinate to the voyage inſured, which is the principal object of the contract; and in caſes of doubt, they muſt be underſtood with reference to the laws of commerce and the uſage of the particular trade. If, therefore, there be in the policy a liberty *to touch, ſtay, and trade at any ports and places in the voyage*; ſuch a liberty, however, general the words may be, does not give the captain a power to change the regular courſe of the voyage inſured, which he muſt keep conſtantly in view: It only extends to the ports and places in the uſual and ordinary courſe of the voyage (*a*).

And however general they do not give the captain a power to *change the voyage*, but only to extend it to places in the uſual courſe of the voyage.

Thus:

(*a*) *Caſaregis*, (diſc. 67, n. 25.) obſerving that the captain in the exerciſe of this liberty ought never to loſe ſight of the voyage inſured, ſays, "Clarum eſt verba apodixiæ ſecuritatis committere voluntati patroni totum itineris decurſum; ita ut in ejus arbitrio regulato tamen à jure et ratione, repoſitum ſit quaſcumque ſcalas, quoſcumque portus ingredi, antecedere in viâ, & retrocedere pro ut exigunt neceſſitas et opportunitas, ſed ſemper

Thus:—An inſurance was made, "At and from *Port* "*L'Orient* to *Pondicherry*, *Madras*, and *China*; and at "and from thence back to the ſhip's port or ports of diſ- "charge in *France*; with liberty to touch in the *outward* "*or homeward bound voyage*, at the Iſles of *France* and "*Bourbon*, *and at all or any other place or places where-* "*ſoever*."—There was alſo a clauſe in the policy, "That "the ſhip in this voyage might *proceed to*, *and touch*, *and* "*ſtay*, *at any ports or places*, as well on this, as on the "other ſide, of the *Cape of Good Hope*, without its be- "ing deemed a deviation."—The ſhip arrived at *Pondicherry*, and, after remaining there a month, ſailed for *Bengal*, inſtead of going to *China*. Having wintered and undergone a repair there, ſhe returned to *Pondicherry*. Both in going and returning, ſhe touched at, and took in goods, or lay off, ſeveral places; and thus prolonged her voyage to and from *Bengal* much beyond the uſual time. Having taken in her homeward cargo at *Pondicherry*, ſhe proceeded on her voyage back to *L'Orient*, but was captured by an *Engliſh* privateer.—In an action on this policy, one queſtion was, whether the voyage to *Bengal* was

A ſhip is inſured from *France* to *Pondicherry* and *China*, and back to *France*; with liberty *to touch and ſtay at ports and places*, &c. This will not cover a voyage to *Bengal*.—A liberty to touch and ſtay at any ports and places means, ports and places *in the uſual courſe of the voyage*.

Lavabre v. *Wilſon* and *Lavabre* v. *Watſon*, *Doug.* 271.

ſemper animo, et intentione proſequendi viaggium uſque ad finem deſtinatam."—The ſame doctrine is laid down by *Emerigon* (tom. 2, p. 32, and ſeq.), and he exemplifies it by the following caſes.—1. An inſurance was made on a voyage from *Marſeilles* to the *Levant* and back, with liberty to the captain, "*de toucher et retrogader per tout ou il lui plairoit.*" The ſhip ſailed to *Cadiz*, where ſhe was loſt.—It was determined that the liberty given by the above clauſe was ſubordinate to the voyage mentioned in the policy; but that here the voyage was changed, and the inſurers diſcharged.—2. A voyage was inſured from *Leghorn* to *Havre de Grace*, with liberty "*de toucher par tout, avant, arriere, à droit et à gauche*, &c. The ſhip ſailed up the *Loire* to put into *Nantes*, and was loſt.—It was held that the inſurers were not anſwerable for the loſs, becauſe the above clauſe only gave liberty to touch at the uſual places in the courſe of the voyage inſured; but not to increaſe the riſk by going up the river beyond the place of deſtination.

inſured

insured by the policy, under the general liberty to touch and stay *at any ports or places?*—Upon this point Lord *Mansfield*, who tried the cause, held clearly, that these general words were, by the expressions "outward and homeward-bound voyages," and "in this voyage," qualified and restrained so as to mean only places *in the usual course of the voyage* to and from the places mentioned in the policy. It was then alledged on the part of the plaintiff, that the voyage to *Bengal* was adopted by *necessity*, for the safety of the ship:—And to prove this, witnesses were called to shew that the ship was so leaky at *Pondicherry*, that she appeared to require careening, which could only be done at *Bengal*, that being the nearest place to which she could proceed with safety for that purpose: That though it turned out, when she got to *Bengal*, that she could be repaired without careening, yet this was only discovered after she was unloaded of much more of her contents than could have been taken out of her in the open road of *Pondicherry*: That, besides the necessity of repair, she was delayed in unloading the outward cargo at *Pondicherry*, till it was too late to undertake the *China* voyage with safety; and *Bengal* was then the safest place to winter at.—The defence relied upon was, 1st, That the ship had never sailed on the voyage insured, her true and original destination having been *Bengal*, and not *China*. 2dly, That, supposing her to have sailed on the voyage described in the policy, yet, her going from *Pondicherry* to *Bengal*, instead of proceeding to *China*, was a deviation, and not justified by *necessity*. In support of the first ground of defence, secret instructions, found on board the ship, were relied upon, which, though obscurely penned, gave room to suspect either that before her departure, the *Bengal* voyage was substituted for that to *China*; or at least that this alternative was left to the discretion of the supercargo, to be decided by events in *India*, which actually happened, so as to determine the voyage to *Bengal*.—On the second ground, it was contended, that from the plaintiff's evidence it appeared that there was no necessity for going to *Bengal*; and that instead of going thither directly, a trading voyage had been made,

made, which afforded a ſtrong preſumption that trading, and not the leak, or lateneſs of the ſeaſon, was the object of going to *Bengal*: Several letters written by the owners alſo raiſed a preſumption that the neceſſity of going to *Bengal* was a pretence deviſed after the capture, when it was feared that the policy would not cover the voyage to that place.—Lord *Mansfield* ſummed up ſtrongly againſt the plaintiff on the ground of fraud. But independant of that, he ſaid that if neceſſity were admitted to have been the ſole motive for ſubſtituting the voyage to *Bengal* in the place of that to *China*, ſtill it was incumbent on the inſured to have purſued that voyage of neceſſity directly, in the ſhorteſt and moſt expeditious manner; and that the delay in going from *Pondicherry* to *Bengal*, and the repeated ſtops by touching at different places, and trading there, were deviations, and not within the protection which the ſuppoſed neceſſity afforded to the direct voyage to *Bengal*.—The jury, notwithſtanding this direction, found a verdict for the plaintiffs, which was afterwards ſet aſide, and a new trial granted, upon the following grounds:—That a deviation from neceſſity muſt be juſtified both as to the ſubſtance and manner; and nothing more muſt be done than what the neceſſity requires:—That the true reaſon why a deviation diſcharges the inſurer, is not the increaſe of the riſk; but, that the party contracting has, without neceſſity, ſubſtituted another voyage for that which was inſured: That the neceſſity of the voyage to *Bengal* did not prove the neceſſity to trade; or to touch at a number of ports all out of the direct courſe, or to conſume ſix weeks or two months, inſtead of ſix days.—The plaintiffs afterwards ſubmitted to the opinion of the court, and abandoned their claim againſt the underwriters (*a*).

The reaſon why a deviation diſcharges the inſurer.

Nothing

(*a*) *Emerigon* (tom. 2, p. 62), has given a tranſlation of this caſe, to which he adds ſome remarks which have been already mentioned, ſup. 29. He adds, that having been conſulted on this caſe by *Lavabre*, *Doerner* and company, bankers at *Paris*, who had lent 180,000 livres on bottomry on the ſhip and cargo,

A letter of marque is not at liberty to cruiſe in queſt of prizes. But ſhe may give chace to an enemy which comes in her way.

Nothing will juſtify a wilful deviation, but a real neceſſity to deviate; and therefore, if a letter of marque leave the convoy to which ſhe belongs, and cruiſe in queſt of prizes, though but for a ſingle night; this will be a fatal deviation (*a*).

But though a ſhip cannot, without deviating, cruiſe in queſt of prizes, yet if an enemy come in the way of a ſhip having letters of marque, ſhe may give chace to the enemy, and in ſo doing, ſhall not be deemed to have deviated.

A letter of marque chaſes an enemy and then loſes ſight of her in the night, and in the morning engages her; this is no deviation.

Tully v. *Walker*, at N. P. Eaſt. Vac. 1781. *Beawes*, 316.

Thus:—A ſhip, having letters of marque, was inſured, "At and from *London* to *Cork* and the *Weſt Indies*."—The ſhip in the night, deſcried a ſhip of the enemy, and after chaſing, loſt ſight of her for ſix hours, and till the morning, when they engaged. She did not take the enemy, but proceeded on her voyage and was afterwards captured: It was agreed on all hands, that though a ſhip, in ſuch circumſtances, could not *cruiſe*, yet it was admitted by the underwriters, that if an enemy *came in her way*, ſhe might engage, or defend herſelf, but they contended that, if ſhe loſt ſight of the enemy, it was no longer chaſing, but *cruiſing*.—Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs.

In the note of this caſe, which ſeems a very defective one, it is not ſtated whether the letter of marque, after ſhe loſt ſight of the enemy in the night, continued cruiſing for her till the morning, or reſumed her courſe to the *Weſt In-*

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and were the inſured in the *Engliſh* policy, he anſwered 1ſt, That *Berard* and company, the borrowers, having broke their contract, it was juſt that they ſhould ſuffer the loſs occaſioned by their contravention of it. 2dly, That, by changing the voyage, the lenders on bottomry, as well as the inſurers, were diſcharged from the perils of the ſea; and conſequently that *Lavabre*, *Doerner* and company were intitled to recover from *Berard* and company the 180,000 livres lent on bottomry, together with the marine intereſt and the intereſt incurred ſince the ſame became due.—(*a*) Per Lord *Camden*, C. J. in *Cock* v. *Townſon*, at N. P. *Beawes*, 316.

dies, and fell in with the enemy again by accident. Probably that was the queſtion left to the jury: If ſo, the inference will be that a *cruiſing* in hopes of meeting the enemy again, after ſhe had been loſt ſight of, would have been a deviation, though *chaſing* her was not.

A liberty to cruiſe for a certain time in the voyage is to be taken as one continued period.

Sometimes a policy on a ſhip of force, with letters of marque, contains a clauſe giving liberty to cruiſe for a certain term in the courſe of her voyage. The following caſe will ſhew, that if it be meant that this term ſhall conſiſt of different periods of time, taken ſeparately, it ought to be ſo expreſſed; otherwiſe the cruiſe will be taken to be for one continued period of time, and not for ſeveral periods amounting to that time.

A letter of marque is inſured for a voyage with liberty to cruiſe for ſix weeks, but no time mentioned for its commencement: The ſhip may cruiſe ſix *ſucceſſive* weeks, but not at different times.

Syers v. *Bridge*, *Doug.* 509.

A letter of marque was inſured, "At and from *Liverpool* to "*Antigua*, with liberty to cruiſe for ſix weeks, and to re- "turn to *Ireland*, or *Falmouth*, or *Milford*, with any prize "or prizes."—This policy was made on the 9th of *February* 1779, and there was no time fixed in it for the commencement, or duration, of the voyage. The ſhip, in fact, ſailed from *Liverpool* on the 28th of *February*, and kept on her direct courſe till the 14th of *March*, chaſing, however, at different times, from the 7th to the 14th, when ſhe began to cruiſe, the captain giving notice thereof to the crew, and ordering a minute of it to be made in the log-book. She continued to cruiſe about the ſame latitude, till the 18th of *April*, and then diſcontinued it, and the captain again gave notice, intending to go to the *Burlings* off *Liſbon*, in the courſe of the voyage. On the 23d, ſhe renewed the cruiſe, of which the captain gave notice as before, and continued it till the 28th, when ſhe was taken by an *American* privateer.—An action was brought on the policy, and, upon the trial, the captain ſwore that before he ſailed the policy broker, (whom he conſidered as acting for both parties), told him that he might cruiſe in any latitude, and at different times, mentioning in his log-book, when he ſhould begin and end; and if the amount of the different times, when added together, ſhould not exceed the ſix weeks, the terms of the inſurance would be complied with.—Witneſſes were called on the part of the defendant, who con-

curred in thinking that, by the terms of the policy, the cruiſe ought to have been for ſix ſucceſſive weeks; not interruptedly and at intervals.—On the other ſide, witneſſes were examined, who thought, on the contrary, that the policy did not import any ſuch reſtriction. But this was admitted, on both ſides, to be only matter of *opinion*.—A verdict was found for the plaintiff, with liberty to the defendant to move for a new trial.—Upon that motion, the court determined that the liberty to cruiſe for ſix weeks, meant ſix *ſucceſſive* weeks from the comment of the cruiſe, and therefore, that cruiſing *at different times* was a deviation which diſcharged the underwriters.—Lord *Mansfield* ſaid;—"This was merely a queſtion of conſtruction, on the face of the policy; and, unleſs an uſage could have been ſhewn in favour of this deſultory cruiſing, calling witneſſes to ſupport it, was calling them to mere *opinion*. None of thoſe produced knew of any *inſtance*, and therefore their evidence ought not to have been received: Yet, I dare ſay, their teſtimony had great weight with the jury. The meaning of words depends on the ſubject. The inſtructions were not read; but they ſhew the meaning very clearly, for they run thus: "To cruiſe ſix weeks, and *then* proceed "to *Antigua*." There can be no general rule. Here the ſubject matter, in my opinion, is deciſive to ſhew that the ſix weeks meant one continued period of time. There are frequently articles for a month's cruiſe, a ſix weeks cruiſe, &c. Such a liberty, as in this caſe, to a letter of marque, is an excuſe for a deviation. But what is contended for by the plaintiffs is impoſſible in practice. Suppoſe the ſhip returns *directly back*, after cruiſing for the ſpace of a week. She may then, perhaps, take three weeks to return to where ſhe had been. Can ſhe then renew the cruiſe, and return again, and ſo repeatedly? The voyage, in that way, might laſt for years. But the true meaning is, "I will excuſe a deviation for "ſix weeks." Six weeks is a continuation, a congregate denomination of time. If they had meant ſeparate days, they would have ſaid 42 days."

Witneſſes may prove an uſage as explanatory of a clauſe in a policy; but their opinion of its *meaning* is not admiſſible evidence.

One

The ſhip muſt perform the voyage within a reaſonable time, and any unneceſſary delay will amount to a deviation.

One reaſon why it is a condition implied in the contract that the ſhip ſhall not deviate, is, that, by departing from the direct courſe of the voyage, the riſk is neceſſarily prolonged. The ſhip muſt therefore proceed on her voyage, not only by the ſhorteſt and ſafeſt courſe, but alſo with all reaſonable expedition; and in the following caſe it was determined, that any unneceſſary delay will be equivalent to a deviation.

A ſhip inſured on a trading voyage on the coaſt of *Africa*, ſtays there beyond the uſual time, as a receiving ſhip for ſlaves; this is equivalent to a deviation.

A ſhip was inſured, "At and from the coaſt of *Africa* "to the *Weſt Indies*, with liberty to exchange goods and "ſlaves."—It appeared that the ſhip ſtayed on the coaſt from *Auguſt* till *March*, and was employed in receiving ſlaves on board, the produce of the cargoes of other ſhips, which were afterwards put on board thoſe ſhips and ſent to the *Weſt Indies*; that this is the employment of what is called a *factory-ſhip*, but a regular factory-ſhip is thatched and covered, and receives the ſlaves till a ſufficient number be collected to ſend away; but it does not appear that any ſlaves, the produce of the ſhip's own cargo, were ſent away in other veſſels, though her ſtay on the coaſt was ſeveral months beyond the uſual ſtay of ſhips in that trade.—The court decided that this was equivalent to a deviation.—Lord *Mansfield* ſaid,—"The ſingle point here is, whether there has not been what is equivalent to a deviation; whether the riſk has not been varied. No matter whether the riſk has or has not been thereby increaſed. If a ſhip inſured for a trading voyage be turned into a floating warehouſe, or a factory ſhip, the riſk is different. It varies the ſtay; for while ſhe is uſed as a warehouſe, no cargo can be bought for her. This is the law. The fact is, that, though this was not a regular *thatched* factory ſhip, yet ſhe was uſed as a thatched factory ſhip is uſed. This being clear, it follows that the riſk is different in point of length, from that which is generally underſtood in the trade, and conſequently from that which was inſured (*a*)."

Hartley v. *Buggin*, B. R. M. 22. *G.* III. MS. S. C. *Park*, 313.

A deviation is not the leſs fatal becauſe the riſk is not increaſed by it.

(*a*) Vid. *Parkinſon*, v. *Collier*, ſup. 169, in which Lord *Kenyon* lays down the ſame doctrine.

Diſtinction between an intended deviation and a different voyage.

A deviation from the voyage inſured is generally the reſult of after-thoughts, after-intereſt, after-temptation; and not of any previous deliberate intention. For it is not eaſy to conceive that any man, at all converſant in buſineſs, would be ſo fooliſh as to intend *before-hand*, to deviate from the voyage deſcribed in the policy; becauſe that would be paying for an indemnity, without having it. When the inſured intends a deviation from the direct courſe of the voyage inſured, it is always provided for, and the policy adapted to it, unleſs fraud be intended. In all caſes of deviation, the *termini à quo* and *ad quem* are the ſame. But where the voyage deſcribed in the policy is not the voyage intended, and the inſured meaning to ſend the ſhip on a different voyage, gives the captain his inſtructions accordingly; this is not the caſe of an *intended deviation*; for there cannot be a deviation from a voyage which was never in the contemplation of the parties; but the caſe of a different voyage from that mentioned in the policy (*a*). It has generally been underſtood, that a deviation merely *intended*, but never begun, will not diſcharge the inſurer (*b*); and two caſes are uſually cited in ſupport of this doctrine.

Whether a deviation intended but not begun will diſcharge the inſurer.

Foſter v. *Wilmer*, 2 *Str.* 1249.

The firſt was an inſurance, "From *Carolina* to *Liſbon*, "and at and from thence to *Briſtol*."—It appeared that the captain had taken in ſalt, which he was to deliver at *Falmouth*, before he went to *Briſtol*, but the ſhip was

(*a*) See the opinions of Lord *Mansfield*, and Mr. Juſtice *Buller*, in *Wooldridge* v. *Boydell*, *Doug.* 18, ſup. 229; and the opinion of Lord *Kenyon* in *Slott* v. *Vaughan*, ſup. 232. See, however, *Kewley* v. *Ryan*, 2 H. *Bl.* 343, ſup. 231.—(*b*) *Roccus* (not. 20) ſays that the voyage is changed as ſoon as the captain begins, or even *agrees for*, another voyage. "*Si caperit ſecundum viaggium licet non completum, vel convenerit aſportare alias merces in alium locum.*"—*Emerigon* (tom. 2, p. 56) denies this latter opinion, and holds that if the captain give up his new project, and proceed on the voyage inſured, the inſurers continue liable. *Caſaregis*, (diſc. 67, n. 24), ſays, "*Mutari viaggium tunc dicitur, quando primam principalem deſtinationem magiſter navis non ſequitur utpote quod navis cum onere, et cum primis vecturis, ad locum deſtinatum amplius non intendit ire, nec eat.*"

taken

taken in the direct road to both places, and before ſhe came to the point where ſhe would have turned off to *Falmouth*.—It was ruled by Lord C. J. *Lee*, that the inſurer was liable; for it was but an *intention* to deviate; which was not ſufficient to diſcharge the underwriter.

The other was the caſe of an inſurance, "From *Honduras* "to *London*;" and it appeared that there was a conſignment of goods to *Amſterdam*. A loſs happened before the ſhip came to the dividing point between the two voyages. This the inſurer was held bound to pay for.

Carter v. *Roy. Ex. Aſſ.* 2 *Str.* 1249.

Theſe two caſes ſeem to have been decided on the ground that a mere *intention* to deviate does not amount to a deviation: But it is proper to obſerve, that theſe are only *niſi prius* deciſions, and that in each of the caſes, particularly in the laſt, the voyage originally intended appears to have been different from the voyage inſured; and therefore it would ſeem that in each, as the law now ſtands, the contract would be held void, upon the ground of fraud, and the voyage being falſely deſcribed in the policy (*a*).

From a certain point in a voyage there are ſeveral tracks to the place of deſtination, with certain advantages and diſadvantages belonging to each, and the captain has always been allowed, when he arrived at the dividing point, to elect, according to circumſtances, which of theſe tracks he will purſue. One of theſe tracks is preſcribed to him by the inſured, and this is not ſtated in the policy, nor even diſcloſed to the underwriters; and the ſhip, having taken the courſe preſcribed, is captured.—It was determined that, under theſe circumſtances, the inſured could not recover for this loſs.—Lord *Kenyon*, Mr. Juſtice *Aſhurſt*, and Mr. Juſtice *Groſe*, founded their opinion on the want of a full diſcloſure of the particular courſe the ſhip was to take, as being a circumſtance that might materially have varied the riſk; and this, whether it were conſidered as a concealment, or a defective

If there be ſeveral tracks to the place of deſtination, of which the captain ought to be at liberty, when he is at the dividing point, to elect one; but the inſured preſcribe one to him, the inſurer is diſcharged. Whether this ought to be conſidered as a deviation or a different voyage originally intended.

Middlewood v. *Blakes*. 7 T. R. 162, ſup. 233.

(*a*) Vid. *Hodgſon* v. *Richardſon*, ſup. 228; *Murdock* v. *Potts*, ſup. 230; *Wooldridge* v. *Boydell*, ſup. 229; *Stott* v. *Vaughan*, ſup. 232; *Kewley* v. *Ryan*, ſup. 231.

deſcription of the voyage in the policy, avoided the contract *ab initio*. Mr. Juſtice *Lawrence* founded his opinion on the ground that this was a *deviation*; and that if the ſhip had been captured before ſhe came to the dividing point, the plaintiff would have been entitled to recover, as the captain's *intention* to deviate did not, before he came to the dividing point, ſubject the underwriters to any additional riſk (*a*).

Sect. 2.

What are the Caſes of Neceſſity that will juſtify a Deviation.

If the maſter act *bonâ fide*, and only aim at performing the voyage in the ſhorteſt and ſafeſt manner, a departure from the direct courſe will be no deviation.

A DEVIATION that will diſcharge the inſurer, muſt be a voluntary departure from the uſual courſe of the voyage inſured, and not warranted by any neceſſity. If a deviation can be juſtified by neceſſity, the inſurer will ſtill remain liable. One general principle pervades all the caſes on this point; namely, that if the captain, in departing from the uſual courſe of the voyage, acts fairly and *bonâ fide*, and according to the beſt of his judgment, for the benefit of all parties concerned, and has no other view but to conduct the ſhip and cargo, by the ſafeſt and ſhorteſt courſe, to her port of deſtination; what he does is within the ſpirit of the contract, and the voyage will ſtill be protected by it. It is no deviation to go out of the way to avoid danger. In all caſes, therefore, in order to determine whether a departure from the direct courſe of the voyage inſured amounts to a deviation that will diſcharge the inſurer, it will be proper to attend to the motives, end, and conſequences of the act, as the true criterion of judgment (*b*).

(*a*) Vid. the opinions of the judges on this caſe fully ſtated, ſup. 235.—(*b*) Per Lord *Mansfield* in *Enderby* v. *Fletcher*, at N. P. Trin. Vac. 1780. Vid. *Pelly* v. *Roy. Ex. Aſſur.* 1 *Bur.* 347. ſup. 181.

The

The cauſes which juſtify a deviation.

The caſes of neceſſity which are moſt frequently adduced to juſtify a departure from the direct courſe of the voyage inſured, are ſtreſs of weather, want of neceſſary repair, joining convoy, eſcaping from or avoiding an enemy, and mutiny of the crew. Theſe we will conſider ſeparately.

Streſs of weather.

And *firſt*, of *ſtreſs of weather*.—If a ſhip be driven by a ſtorm into any port out of the courſe of the voyage, ſhe is not obliged to return back to the point from whence ſhe was driven, but may make the beſt of her way to her port of deſtination; and this ſhall not be deemed a deviation. For what is occaſioned by the act of God ſhall be imputed to no man as a fault.

A ſhip, inſured from *St. Kitts* to *London*, is driven by a ſtorm out of the port of *St. Kitts* to *St. Euſtatia*, and being unable to return, completes her cargo there, and proceeds on her voyage: This deviation will not diſcharge the inſurers.

Delany v. *Stoddart*, 1 T. R. 22.

Thus, where the plaintiff, a merchant in the *Weſt Indies*, wrote to the defendant who was his correſpondent in *London*, deſiring him to get an inſurance effected on the ſhip *Friendſhip*, "At and from *St. Kitts* to *London*, "warranted to ſail with convoy."—The defendant neglecting to make this inſurance according to the order, and the ſhip being loſt, the plaintiff brought an action on the caſe againſt the defendant to recover the loſs.—On the trial of the cauſe it appeared that the ſhip left the port of *St. Kitts* to take in her cargo, and let go an anchor at *Sandy Point*; but as the wind blew freſh, ſhe drove out, and could not come in again, but was obliged to go to *St Euſtatia*: That ſhe ſailed from thence with the convoy, and afterwards foundered at ſea: That *St. Euſtatia* is in the direct line from *St. Kitts* to *London*; and the convoy from *St. Kitts* always looked into *St. Euſtatia*, to take up any ſhips that might be there: That when the ſhip was driven to *St. Euſtatia*, after making ſeveral unſucceſsful efforts to get back to *St. Kitts* to finiſh her loading, ſhe took the reſt of her loading at *St. Euſtatia*.—The principal queſtion was, whether there had been a deviation (*a*). —The court determined that there was no deviation.—Lord *Mansfield* ſaid,—"The only queſtion is, whether

(*a*) In this action the defendant has a right to make every objection to the plaintiffs recovering which an underwriter might have made in an action on the policy, had one been regularly effected. Vid. ſup. 209.

this

this be the ſame voyage as that intended to be inſured. If a ſtorm drive a ſhip into any port out of the courſe of her voyage, and being there, ſhe does the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven: Here the ſhip tried to go back to *St. Kitts*, but could not; and it is a much eaſier navigation to go directly from *St. Euſtatia* to *London*, than to go back to *St. Kitts* firſt. She loſt no time in taking in her cargo at *St. Euſtatia*. Every thing ſhould be imputed to the ſtorm, which was in reality done and occaſioned by it. It was a queſtion to be left to a jury, whether this was the ſame voyage or not; and they have determined it.—Mr. Juſtice *Aſhurſt* and Mr. Juſtice *Buller* concurred in this opinion, and laid much ſtreſs on the circumſtance of the riſk being diminiſhed by the ſhip's remaining at *St. Euſtatia*, and completing her cargo there, inſtead of returning to *St. Kitts*. —Mr. Juſtice *Willes* differed from the other judges.

Want of neceſſary repair.

2. The *want of neceſſary repair* is another excuſe for a departure from the direct courſe of the voyage. If, in the courſe of the voyage, the ſhip, from ſtreſs of weather, damage received from an enemy, or any other cauſe, be reduced to ſuch a ſtate that ſhe cannot ſafely proceed on her voyage, without repairs, the captain will be juſtified in carrying the ſhip to ſome port, the leaſt out of his courſe, where ſuch repairs can be had; and he muſt content himſelf with ſuch repairs as can be moſt expeditiouſly done, ſo as to enable the ſhip to perform the voyage inſured.

A ſhip, inſured from *Fort St. George* to *London*, goes to *Bengal* to refit: This is no deviation, if ſhe could not refit at *Fort St. George*, and *Bengal* was the neareſt place.

As where a ſhip was inſured "from *Bengal* to *London*; "the adventure to commence from her arrival at *Fort St.* "*George*, with liberty to ſtay at any ports or places with- "out prejudice."—The ſhip came to *Fort St. George* in *February* 1733 in her way to *England*, but being leaky, and in very bad condition, by the advice of the governor and council, ſhe ſailed for *Bengal to be refitted*. After being ſheathed, ſhe, in her homeward voyage, was ſtranded and loſt.—There was evidence to prove that *Bengal* was the proper place to refit, and that the ſhip had her lading taken out, and went thither for that purpoſe

Motteaux v. *Lond. Aſſur.* 1 *Atk.* 545.

poſe only: That this was a voyage of neceſſity, and not a trading voyage; for ſhe took nothing on board but proviſions and ballaſt. Lord Chancellor *Hardwicke*, though he admitted that want of neceſſary repair would juſtify a ſhip in going to the neareſt place where that could be had; yet, as there was no proof to ſhew that the ſhip could not have been equally repaired at *Fort St. George*, he directed an iſſue to try whether the loſs had happened during the voyage inſured. The cauſe was tried at *Guildhall*, and the inſured recovered.

So, where an inſurance was made on a ſhip, "At and "from *Rochelle* to the coaſt of *Africa*, during her ſtay "and trade there, and at and from thence to *St. Domingo*." —Three days after the ſhip ſailed from *Rochelle*, ſhe met with a gale of wind, which ſtrained her ſeams, and ſplit her mizen yard, and damaged her rigging. The crew, in a body, deſired the captain, for the preſervation of their lives, to make to ſome port to repair. The captain, finding that the ſhip, which was new, had too little ballaſt, complied, and put into *Liſbon*, the neareſt port; from whence, after taking 500 rolls of tobacco, as ballaſt (*a*), he proceeded to *Guinea*, and from thence to *St. Domingo*, but the ſhip was captured in ſight of that iſland.— In an action on the policy, it was inſiſted, on the part of the defendant, that going to *Liſbon* was a deviation, and witneſſes were called to prove that, from the latitude in which the ſtorm happened, ſhe might have proceeded to the coaſt of *Africa*, and there have repaired at a leſs expence, and that ſhe could not need additional ballaſt. But it came out that no additional premium would have been required for liberty to touch at *Liſbon*.— Lord *Mansfield* laid much ſtreſs on this circumſtance (*b*), and

Guibert v. *Redſhaw*, at N. P. Hil. Vac. 1781. *Park* 301. S. P.

(*a*) For any thing that appears in the note of this caſe, the captain went to *Liſbon* only for ballaſt, nor does it appear that the ſhip had any ſort of repair there. Perhaps the neceſſity of getting more ballaſt would have juſtified going to *Liſbon*; but that is not the ground upon which the caſe is ſtated to have been put.—(*b*) The reaſon why a deviation diſcharges the underwriter is, not becauſe the riſk is thereby increaſed, but becauſe

and left it to the jury on the ground of neceſſity to go to *Liſbon* for repairs.—The plaintiff had a verdict.

Joining convoy.

3. A third cauſe of juſtifiable deviation is when the ſhip is obliged to go out of her direct courſe in order *to join convoy* (*a*).

If a ſhip go out of her way to join convoy, this is no deviation.

As where the *William* galley was inſured, "From *Bremen* to *London*, warranted to depart with convoy."—The galley ſailed from *Bremen* under convoy of a *Dutch* man of war, to the *Elb*, where they were joined by two other *Dutch* men of war and ſeveral *Engliſh* merchant ſhips. From thence they ſailed to the *Texel*, where ſhe found a ſquadron of *Engliſh* men of war. After a ſtay of nine weeks, they ſailed from the *Texel*, and the galley, being ſeparated in a ſtorm, was taken by a *French* privateer, retaken by a *Dutch* privateer, and paid 80 l. ſalvage.—In an action on the policy to recover this loſs, it was ruled by Lord C. J. *Holt*, that the voyage ought to be according to uſage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for, till after the year 1703, there was no convoy for ſhips directly from *Bremen* to *London*; and the plaintiff had a verdict.

Bond v. *Gonſales*, at N. P. 2 *Salk.* 445. S. P. *Gordon* v. *Morley*, ſup. 265; and *Campbell* v. *Bourdieu*, 2 *Str.* 1265, S. P. *Bond* v. *Nutt*, *Comp.* 601. ſup. 255.

Avoiding an enemy.

4. To eſcape from, or avoid, an enemy, is another cauſe of excuſable deviation, of the ſame nature as the laſt (*b*).

Mutiny of the crew.

5. The laſt caſe of this ſort which I ſhall mention is, where the captain, under the compulſion of a mutinous crew, is forced to leave the direct courſe of his voyage, and put into port.

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cauſe the voyage performed is not the voyage inſured. (Vid. ſup.) The circumſtance of the premium being the ſame, had liberty to touch at *Liſbon* been given in the policy, ought not, therefore, to have had any other effect than to prove that it was not originally intended to put into *Liſbon*; for if that had been intended, it might have been provided for in the policy, without any additional expence of preminm.—(*a*) Per Lord *Mansfield* in *Bond* v. *Nutt*, ſup. 257.—(*b*) *Roccus*, Reſp. 30, n. 1, & 31, n. 3. *Caſaregis*, diſ. 1, n. 68. *Pothier*, h. t. n. 51, *Emerig*, tom. 2, p. 57.

At

As, where a letter of marque, inſured for a voyage from *Briſtol* to *Newfoundland*, ſailed with expreſs orders, that if ſhe ſhould take a prize, ſhe ſhould nevertheleſs proceed on her voyage; and that ſome hands ſhould be put on board the prize and ſent with it to *Briſtol*. A prize was taken in the courſe of the voyage, and the captain ordered ſome of the crew to carry it to *Briſtol*, while he proceeded on his voyage: But the crew oppoſed him, and inſiſted on his going back, though he acquainted them with his orders. He was forced however to ſubmit, and on his return, his own ſhip was taken.—The underwriters inſiſted that this was a deviation which diſcharged them: But Lord Chief Juſtice *Lee* held that this was excuſed by the force upon the maſter, which he could not reſiſt; and therefore fell within the excuſe of neceſſity, which had always been allowed (*a*).

The crew of a letter of marque compel the captain to return home with a prize, inſtead of proceeding on his voyage according to his orders; this will excuſe the deviation.

Elton v. *Brogden*, at N. P. 2 *Ser.* 1264. Inſ.

From theſe authorities it is plain that nothing will juſtify a deviation but a real and imperious neceſſity, and that the extent of the deviation muſt be juſtified by the degree of that neceſſity.

The *extent* of the deviation muſt be juſtified by the degree of neceſſity.

It only remains to be obſerved, that where a ſhip is compelled by any neceſſity to deviate from the uſual and regular courſe of the voyage, ſhe muſt purſue the new voyage of neceſſity ſo as to get to her port of deſtination by the ſhorteſt and ſafeſt courſe ſhe can take; and any wilful departure from the direct courſe of this voyage, or any unneceſſary delay, will be a new deviation, which will diſcharge the underwriters in like manner as if it had been a deviation from the original voyage (*b*).

And the inſured muſt not deviate from the voyage of neceſſity.

(*a*) Vid. inf. S. C. under the head of barratry.—(*b*) R. *Lavabre* v. *Wilſon*, *Doug.* 271, ſup. 186, 399.

CHAP.

CHAP. XIII.

Of Loſs.

A LOSS, in inſurance, is the injury or damage ſuſtained by the inſured in conſequence of the happening of one or more of the accidents or misfortunes againſt which the inſurer, in conſideration of the premium, has undertaken to indemnify the inſured. Theſe accidents or misfortunes, or perils, as they are uſually denominated, are all diſtinctly enumerated in every policy. In our common policies they are ſet forth in the following words.

Perils uſually inſured againſt.

'Touching the adventures and perils which we the 'aſſurers are content to bear, and do take upon us in this 'voyage, they are of the ſeas, men of war, fire, enemies, 'pirates, rovers, thieves, jettiſons, letters of mart and coun'ter mart, ſurprizals, takings at ſea, arreſts, reſtraints, and 'detainments of all kings, princes, and people, of what 'nation, condition, or quality ſoever, barratry of the 'maſter and mariners, and of all other perils, loſſes, and 'misfortunes, that have or ſhall come to the hurt, detri'ment or damage of the ſaid goods and merchandizes, 'and ſhip, &c. or any part thereof.'

Total loſs.

Every loſs is either total or partial. The term *total loſs* is underſtood in two different ſenſes; natural and legal. In its natural ſenſe, it ſignifies the abſolute deſtruction of the thing inſured. In its legal ſenſe, it means not only the total deſtruction, but likewiſe ſuch damage, to the thing inſured, though it may ſpecifically remain, as renders it of little or no value to the owner. So a loſs is ſaid to be total, if, in conſequence of the misfortune that has happened, the voyage be loſt, or not worth purſuing,

ſuing, and the projected adventure fruſtrated; or if the value of what is ſaved be leſs than the freight, &c.

A *partial loſs* is any loſs or damage ſhort of, or not amounting to, a total loſs; for if it be not the latter, it muſt be the former.—Thus, if a ſhip, inſured for a given voyage, arrive at her port of deſtination, and there remain 24 hours moored in ſafety; or, if ſhe be inſured for a *term*, and ſhe ſurvive the term; no injury which ſhe could have ſuſtained during the voyage, in the one caſe, or during the term, in the other, however great, can amount to a total loſs (*a*). So, in the caſe of an inſurance on goods; the inſurer contracts that they ſhall arrive ſafe at the port of delivery; or if not, that he will indemnify the inſured. If they ſpecifically remain and are actually landed at the port of delivery, however damaged in the voyage, the injury will amount but to a partial loſs (*b*). Partial loſs. To ſhip. To goods.

Partial loſſes are ſometimes denominated *average* loſſes, becauſe they are often of the nature of thoſe loſſes which are the ſubject of average contributions; and they are diſtinguiſhed into general and particular averages (*c*). Average loſs.

Having premiſed thus much of the nature and different kinds of loſſes, we will now proceed to conſider this branch of our ſubject under the following heads:

1. Loſs by the perils of the ſea;
2. Loſs by running foul of another veſſel;
3. Loſs by fire;
4. Loſs by capture;
5. Loſs by arreſt and detention of princes;
6. Loſs by barratry;
7. Loſs by average contributions;
8. Loſs by expence of ſalvage;
9. Of wilful and fraudulent loſſes.

(*a*) Vid. *Cazalet* v. *St. Barbe*, *Furneau* v. *Bradley*, *Fitzgerald*, v. *Poole*, inf. c. 14, § 2.—(*b*) Vid. *Cocking* v. *Fraſer*, ſup. 144.—(*c*) Vid. inf. § 7.

Sect.

Sect. 1.

Of Loſs by the Perils of the Sea.

What is meant by perils of the ſea.

IN a large ſenſe, all the accidents or misfortunes to which thoſe engaged in maritime adventures are expoſed, may be called perils of the ſea (*a*). But it has been found convenient to diſtinguiſh the loſſes to which ſhips and goods at ſea are liable, by the *immediate cauſes* to which they may be particularly aſcribed. In this view, loſſes *by the perils of the ſea* are underſtood to mean only ſuch accidents or misfortunes as proceed from mere *ſea-damage*, that is, ſuch as ariſe from ſtreſs of weather, winds, and waves, from lightning and tempeſts, from rocks and ſands, &c.

Foundering.

Stranding.

A loſs by the perils of the ſea may therefore happen, *firſt*, by the ſhip's foundering at ſea, and then it muſt, in moſt caſes, be total in the ſtricteſt ſenſe of the word: *Secondly*, by ſtranding, which is either *accidental*, as where the ſhip is driven on ſhore by the winds and waves; or *voluntary*, as where ſhe is intentionally run on ſhore, either to preſerve her from a worſe fate, or for ſome fraudulent purpoſe. A ſtranding may be followed by ſhipwreck, in which caſe it becomes a total loſs; or the ſhip may be got off in a condition to proſecute her voyage, and then the damage ſuſtained and the expences incurred will be only a partial loſs of the nature of a general average:—

Striking againſt a ſunken rock, &c.

Thirdly, by the ſhip's ſtriking againſt a ſunken rock, or any other thing under water, which may occaſion the ſpringing of a leak, or abſolute ſhipwreck.

If a ſhip be not heard of within a reaſonable time, ſhe ſhall be preſumed to have foundered at ſea.

It often happens that ſhips founder at ſea, and all on board periſh, and this out of the view of any perſon who could convey any information of the misfortune to the owners. In ſuch caſe, therefore, there can be no poſitive proof of the cauſe of the loſs. But where no intelligence has been received of a ſhip within a reaſonable time after ſhe has

(*a*) Vid. 2 *Rol.* Ab. 248, pl. 10; *Comb.* 56; 1 *Show.* 322, 3.

ſailed,

ſailed, it may reaſonably be preſumed that ſhe foundered at ſea; becauſe every other loſs would probably, ſooner or later, have been heard of.

A ſhip not being heard of in four years after ſhe ſailed, the inſured may ſue the underwriters as for a loſs by *ſinking at ſea.*

As, where a ſhip was inſured in 1739, "from *North* "*Carolina* to *London*, with a warranty againſt captures "and ſeizures."—Four years after the ſhip ſailed, an action was brought on the policy, and in the declaration the loſs was alledged to have happened *by ſinking at ſea*, and the evidence was, that ſhe ſailed on her intended voyage, and had never afterwards been heard of.—It was inſiſted, for the defendant, that, as captures and ſeizures were excepted, it lay upon the plaintiff to prove that the loſs happened in the particular manner declared on.—But Lord C. J. *Lee* ſaid, that it would be unreaſonable to expect certain evidence of ſuch a loſs, where every perſon on board is preſumed to have periſhed: And all that can be required is, the beſt proof the nature of the caſe admits of. He therefore left it to the jury, who found for the plaintiff.

Green v. *Brown*, at N. P. 2 Str. 1199.

A ſhip ſails from *Newcaſtle* for *Copenhagen*, and is never after heard of, and ſeveral others that ſailed after ſhe did, arrived ſafe: This is ſufficient evidence that ſhe periſhed at ſea.

So, where a ſhip was inſured, "Againſt any loſs hap- "pening before the 30th of *November* 1762, free from "average."—The ſhip ſailed from *Newcaſtle* for *Copenhagen* (*a*), which is uſually about ten days voyage; but was taken by a *French* privateer, and ranſomed; and then proceeded on her voyage to *Copenhagen* in a bad condition. She never was heard of afterwards, though all due diligence was uſed to obtain intelligence of her, and ſeveral ſhips that ſailed after ſhe did, arrived ſafe at *Copenhagen*.—Lord *Mansfield* told the jury that this evidence was a ſufficient ground to preſume that the ſhip periſhed at ſea, unleſs the contrary appeared. The jury accordingly found for the plaintiff.

Newby v. *Read* at N. P. Mich. Vac. 3 G. III. *Park* 63.

In ſome countries there is a limitation of time for this preſumption.

In *France* and *Spain* poſitive regulations have been made, to aſcertain the time when the inſured may call on the underwriters for the loſs, on the preſumption that a miſ-

(*a*) It is ſtrange that in the note of this caſe there is no mention of the time of the ſhip's ſailing, nor does it appear how long after ſhe ſailed the plaintiff brought his action.

ſing ſhip has periſhed at ſea. In *Spain*, if a ſhip has not been heard of for a year and a half from her departure on a voyage to or from the *Indies*, ſhe is deemed loſt. In *France*, after a year from a ſhip's ſailing on *common voyages*, and two years on *diſtant voyages*, the inſured may abandon and demand payment without other proof of loſs (*a*).

In *England* there is no ſuch limitation.

With us there is no time fixed by law when a miſſing ſhip ſhall be preſumed to have foundered at ſea. Every caſe muſt depend on its own circumſtances; and it would be difficult to frame any certain uniform regulation for this purpoſe, that might not be productive of more inconvenience than advantage. Perſons well acquainted with maritime affairs may form a pretty correct judgment when a ſhip, in any caſe, may be reaſonably deſpaired of. When that time arrives, a liberal underwriter will pay his loſs; and if any doubt remain, he may either demand ſecurity from the inſured to refund the money, in caſe the ſhip ſhould afterwards arrive ſafe, or he may truſt to his remedy by action, to recover it back (*b*).

If a ſhip be driven by ſtreſs of weather on an enemy's coaſt, and there captured; this is a loſs by capture, not by the perils of the ſea.

Every loſs muſt be imputed to its immediate, and not to any remote cauſe. Therefore, if a ſhip be driven by ſtreſs of weather on an enemy's coaſt, but not materially damaged, and ſhe be there captured; this is not a loſs by the perils of the ſea, but by *capture*; and for this the inſured may recover upon a policy againſt capture only (*c*). And yet it has been holden that capture is a loſs by the perils of the ſea, as much as if it were occaſioned by ſhipwreck or tempeſt (*d*).

If ſlaves be thrown overboard, on account of a ſcarcity of water, occaſioned by the captain's miſtaking his courſe; this is not a loſs by the perils of the ſea.

If the maſter of a ſlave ſhip miſtake his courſe, whereby a ſcarcity of water enſues, and a number of ſlaves are thrown overboard to ſave the reſt; it will not be ſufficient for the inſured, in declaring for this loſs, to ſtate that, by contrary winds and currents, and *the perils of*

(*a*) Vid. 2 *Mag.* 33. 177, Ord. of *Louis* XIV, h. t. art. 58. (*b*) Vid. *Tomkins* v. *Bernet*, 1 *Salk.* 22.—(*c*) Per Lord *Kenyon*, at N. P. *Green* v. *Elmſlie*, *Peake* 212. inf. c. 17, § 3. —(*d*) 2 *Rol.* Ab. 248, pl. 10, *Comb.* 56. 1 *Show.* 322, 3.

the

the ſea, the ſhip was retarded, and the ſlaves periſhed for want of water *(a)*.

So, where a number of ſlaves periſhed for want of ſufficient and proper food, and this failure was occaſioned by extraordinary delay in the voyage, ariſing from bad and ſtormy weather; this was holden to be a loſs by natural death, and not by the perils of the ſea (*b*).

So, if the ſlaves die for want of food, occaſioned by the extraordinary length of the voyage.

So, where a ſhip was inſured from *St. Bartholemew* to the coaſt of *Africa*, and during her ſtay and trade there, and back to *St. Bartholemew*.—In an action upon this policy for a total loſs by the *perils of the ſea*, it was attempted to recover as for a total loſs, upon evidence that ſhe was deſtroyed by the worms, which are well known to infeſt the rivers in hot climates. A merchant ſwore that he had known many inſtances of loſs by this ſpecies of injury, but that the underwriters had uniformly refuſed to pay.—Lord *Kenyon*, who tried the cauſe, decided, upon this evidence, that this was not a loſs by the perils of the ſea; and the jury unanimouſly concured with his lordſhip, and found a verdict for the defendant.

If a ſhip be deſtroyed by worms, this is not a loſs by the perils of the ſea.

Rhol v. *Parr*, Eſp. 444. Inſ.

(*a*) It were impoſſible to paſs over the mention of this caſe, without ſome mark of reprobation. Falſe reaſoning has never been carried to the length of maintaining that human beings, however degraded their condition, could be juſtifiably thrown overboard, like ſo many bales of goods, to lighten a ſhip in a ſtorm. Every thing on board, however precious, ſhould be thrown into the ſea ſooner than the meaneſt ſlave. Some have ſuppoſed that if, in a caſe of extreme neceſſity, a part of the crew might be ſacrificed to ſave the reſt, the fate of the victims ſhould be determined by lot equally amongſt all. But *Puffendorff*, with ſounder reaſoning, maintains, that whoever, under pretence of ſaving the ſhip, ſhould throw men into the ſea, whether freemen or ſlaves, and whether by lot or without lot, is guilty of homicide; for no man, in order to ſave his own life, has a right to take away the life of any other human being, who does not attack him. Vid. *Puffend.* lib. 2. c. 6. § 3. ff. de reg. jur. 32. *Cic.* off. l. 3. c. 23.—(*b*) *Rhol* v. *Parr*, 6 T. R. 656, inf. c. 15. § 1.

The inſurer is not anſwerable for any damage to the ſhip occaſioned by the ordinary ſervices ſhe is engaged in.

The inſurer is not anſwerable for any diminution in the value of the ſhip, her rigging or furniture, if this be occaſioned by the ordinary ſervice ſhe is engaged in. As if a cable break by the friction of the rocks, and an anchor be loſt, the inſurers are not anſwerable. But if by ſome extraordinary accident, as the violence of the winds or waves, it become neceſſary to ſlip a cable, or a cable be broke, and an anchor loſt, or a ſail or yard be carried away, this is a loſs by the perils of the ſea within the policy (*a*).

For what loſs of animals the inſurer is liable.

If animals be inſured, their death, occaſioned by tempeſts, by the ſhot of an enemy, by jettiſon in a ſtorm, or by any other extraordinary accident, is a loſs within the policy. Not ſo, if it be occaſioned by diſeaſe (*b*).—*Valin*, and after him *Pothier*, claſs animals and negro ſlaves under the ſame head, and apply the ſame rules to both (*c*).

Sect. 2.

Of Loſs by Running Foul.

A SPECIES of damage to which ſhips at ſea are often expoſed, is that occaſioned by one ſhip running foul of another. This may be the effect of mere accident, without blame being imputable to the maſter of either ſhip; or it may be occaſioned by the negligence or miſconduct of one or both of them. The injury occaſioned by this accident is a loſs within the policy (*d*), unleſs it be imputable to the miſconduct of the maſter or mariners of the ſhip inſured; in which caſe the inſurer is not liable,

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(*a*) *Valin* ſur art. 29, p. 76, *Pothier*, h. t. n. 66. *Emerig.* tom. 1, p. 393.—(*b*) *Emerig.* ib.—(*c*) Vid *Valin* ſur art. 11, and 15. *Pothier*, h. t. n. 66.—(*d*) Vid. Ord. de *Louis* XIV., tit. *avaries*, art. 11, and tit. *aſſurance*, art. 26.

according

according to the opinion of *Emerigon (a)*. But in ſuch caſe, the miſconduct of the maſter or mariners would, I conceive, amount to barratry; and as that is a riſk always mentioned in our policies, the inſurer would be liable for the loſs. An action, however, would lie againſt the maſter of either ſhip, to whom negligence or miſconduct is imputable, for the loſs he has occaſioned.

Sect. 3.

Of Loſs by Fire.

Whether a loſs by fire imputable to the fault of the maſter or mariners, be a loſs within the policy.

There can be no doubt but that a loſs occaſioned by fire which is merely accidental, and not imputable to any fault of the maſter or mariners, is a loſs within the policy; and in many places the inſurer is held to be liable, even where the fire happens by the fault of the maſter or mariners *(b)*. But in *France* the inſurer is not held anſwerable in ſuch caſe, unleſs, by the policy, he be liable for barratry *(c)*.

If a ſhip be burnt by order of the ſtate where ſhe happens to be, to prevent infection; this is a loſs within the policy.

Emerigon mentions two caſes on this ſubject—In the one, a *Dutch* veſſel was refuſed admittance into the port of *Majorca*, and was burnt by the *Spaniards*, from an apprehenſion that ſhe had the plague on board: There the inſurer was holden to be liable, no blame being imputable to the maſter or mariners.—In the other, a ſhip, with the plague on board, of which ſeveral perſons had died, was carried into the port of *Marſeilles*, the maſter pretending that the deaths were occaſioned by *unwholeſome food*. The infection was communicated to the town and neighbouring country. The ſhip was burnt.—Here it was determined that the inſurer was not liable, upon the ground that the loſs was occaſioned by the miſconduct

(*a*) Vid. *Emerig.* tom. 1, p. 413.—(*b*) *Straccha*, gl. 18, *Targa*, ch. 65. *Emerig.* tom. 1, p. 434.—(*c*) *Pothier*, h. t. n. 53. *Emerig.* ib.

of the maſter *(a)*.—In this caſe barratry could not have been one of the perils inſerted in the policy.

If a ſhip be attacked by an enemy, and the maſter find it impoſſible to defend her, he may leave her and ſet her on fire, to prevent her falling into the enemy's hands, provided he can preſerve the lives of the crew. In ſuch caſe, the inſurer is liable for the loſs; for the maſter was juſtified in burning the ſhip under ſuch circumſtances *(b)*.

Sect. 4.

Of Loſs by Capture.

What ſhall be deemed a capture.

CAPTURE is when a ſhip is ſubdued and taken by an enemy in open war, or by way of repriſals, or by a pirate, and with intent to deprive the owner of it.—Capture may be with intent to poſſeſs both ſhip and cargo, or only to ſeize the goods of the enemy, or contraband goods, which are on board.—The former is a capture of the ſhip in the proper ſenſe of the word; the latter is only an arreſt and detention, without any deſign to diſpoſſeſs the owner.—Capture is deemed *lawful*, when made by a declared enemy, according to the laws of war; and *unlawful*, when it is againſt the rules eſtabliſhed by the law of nations.

Every capture, whether lawful or unlawful, is a loſs within the policy.

But for every loſs occaſioned by capture, whether lawful or unlawful, and whether by friends or enemies, the inſurer is liable *(c)*, the words of the policy being ſufficiently comprehenſive to include every ſpecies of capture to which ſhips at ſea can ever be expoſed.

And the inſurers are anſwerable, to the extent of the ſum inſured, for the loſs actually ſuſtained.

And in every caſe of capture the inſurer is anſwerable, to the extent of the ſum inſured, for the loſs actually ſuſtained. This may be either *total*, as where the ſhip or

(*a*) *Emerig.* ut ſup.—(*b*) *Pothier*, h. t. n. 53. *Valin*, art. 26. h. t.—(*c*) *Le Guidon*, ch. 7. n. 1. *Caſaregis*, diſc. 1. n. 118. *Roccus*; n. 41, 54, 55, 64, 66. *Valin*, art. 26, h. t. *Pothier*, h. t. n. 54.

goods

goods insured are not recovered again; or *partial*, as where the ship is recaptured or restored before abandonment; in which case the insurer is bound to pay the salvage, and any other necessary expence the insured may have been put to for the recovery of his property.

And the insurer is liable for a loss by capture, whether the property in the thing insured be changed by the capture or not. For a ship is lost by capture, though she be never condemned, or even carried into any port or fleet of the enemy. It can never, therefore, be a question between the insurer and the insured, whether the capture be lawful or not, or whether the property be changed by condemnation, or by being carried into an enemy's port. A capture by a pirate, or under a commission, when there is no war, does not change the property; and yet, as between the insurer and the insured, it is just upon the same footing as a capture by an enemy in open and declared hostilities: For whatever rule ought to be observed in questions of this sort, as between the owner and the *recaptor* or his *vendee*, it can in no way affect the case, as between the *insured* and the *insurer*.

And they are liable, whether the property be changed or not by the capture.

Therefore, as to the length of possession by an enemy, which is deemed sufficient to divest the property out of the original owner, or the effect of a re-capture in revesting it,—these are now matters which can never come directly in question between insurer and insured. They never could have come in question, in any case of insurance upon *real interest*; because, according to the above principles, they never could have varied the case. They could only have had their origin in gaming insurances, in which there could be no average or benefit of salvage, and in which, therefore, it was always necessary to set up a total loss, for the purpose of the wager. In gaming insurances, when there was a re-capture, the claim, as for a total loss, seems formerly to have involved the question, whether the property in the thing insured had, by the capture, or any proceeding founded on it,

Therefore the effect of capture and recapture, in divesting or revesting the property, can make no question, except in insurances without interest.

been diveſted out of the original owner, or not, before the re-capture.

And yet where a ſhip is inſured "*intereſt or no* "*intereſt*," a capture, however illegal, and though the ſhip be retaken, is a total loſs.

And yet, the four following caſes will ſhew that, upon inſurances '*intereſt or no intereſt*,' it has been repeatedly determined that if the ſhip be taken, it is a total loſs, however illegal the capture may be, and though the ſhip be retaken and reſtored to the owner.

It is obſervable, however, that the policies in the firſt, ſecond, and fourth of theſe caſes, though they contained the words "*intereſt or no intereſt*," were evidently inſurances upon real intereſt.—Lord *Mansfield*, indeed, in his obſervations on the firſt of them *(a)*, ſays, 'that it was the caſe of a *wager policy*; and the ſhip having been once in fact taken, the event had happened againſt which the inſurance was made, though ſhe was afterwards recovered.'—But his lordſhip muſt have been miſled by the words, "*intereſt or no intereſt*,"—to ſuppoſe this to be a wager policy; for it is plain, from the judgment, that the court conſidered the plaintiff as intereſted in the ſhip.

A ſhip inſured, *intereſt or no intereſt*, being captured, this is a total loſs, though the capture was illegal, and the ſhip recaptured.

De Paiba v. *Ludlow*, 1 *Com.* 391.

As where a ſhip, inſured "*intereſt or no intereſt*," was taken by a *Swediſh* pirate, and, after continuing in his poſſeſſion for nine days, was re-taken by an *Engliſh* man of war, and carried into *Harwich*, but not till after an action was brought on the policy:—The court held that though the ſhip was retaken, yet the plaintiff received a damage, for his voyage was interrupted: That the queſtion was not, whether the plaintiff ſhould have his ſhip again, and ſhould not loſe his property, but what damage he had ſuſtained.

A privateer inſured for a three months cruiſe, "*intereſt or no intereſt*," is taken and detained for three days, and then retaken, yet it is a total loſs.

Feal v. *King*, *Aſſ.* 1781.

So, where a privateer was inſured "for three months, "*intereſt or no intereſt*, free from average, and without benefit of ſalvage."—The ſhip was taken by a *French* ſhip of war, within the three months; her guns and 117 of her men taken out of her, and carried into *France*. But after ſhe

(*a*) Vid. Lord *Mansfield*'s obſervation on *De Paiba* v. *Ludlow*, 2 *Bur.* 695.

had

had remained in poſſeſſion of the enemy for three whole days, and before ſhe was carried into any port of the enemy, ſhe was retaken by an *Engliſh* privateer, and carried into *Liſbon*, before the expiration of the three months; ſo that, by the capture, ſhe was prevented from finiſhing her cruiſe. It appeared that the inſured was intereſted to more than the amount of the ſum inſured; and that the maſter of the privateer had obtained a decree in the court of admiralty of *Gibraltar* that the ſhip ſhould be reſtored to the owners, on payment of one third part for ſalvage.—The court determined that, though the ſhip was never carried *infra præſidia hoſtium*, this was not an average, but a total loſs to the inſured.—Lord C. J. *Lee*, in delivering the opinion of the court ſaid;—"Although by the civil law it may not, perhaps, be adjudged a total loſs, yet the rules of that law are not to govern us, but we muſt give our judgment according to the common law of *England*, upon this agreement between the parties, whoſe intention appears and muſt guide us. By the civil law, there muſt be a total loſs, to entitle the inſured to recover; but the policy, in this caſe, extends to captures and other accidents.—The meaning of the parties here is plain: The inſured paid his premium in conſideration of the inſurer's undertaking that the ſhip ſhould cruiſe ſafely for three months; the jury have found that ſhe was diſabled from proſecuting her cruiſe for three months. The inſurance is to be underſtood for the cruiſe of three months, and in common ſenſe it cannot be otherwiſe; ſo that, as ſoon as the voyage is broken or interrupted, the cruiſe is at an end. Safety during the three months is what is meant; but it appears that the ſhip was taken and detained within that time, and that the plaintiff was hindered in his cruiſe; and this, by our law is a total loſs to the plaintiff. I have avoided ſaying any thing on the queſtion, whether this was a prize or not, as having never been carried *infra præſidia hoſtium*, becauſe we are all of opinion that this is a total loſs."

So, where the inſurance was, "on *goods, intereſt or no intereſt*, at and from *Jamaica* to *Briſtol*."—The ſhip in her

Goods are inſured "*intereſt or no intereſt*."

The ſhip is taken

and carried into e enemy's port; and after eight days cut out, and reſtored to the owner, on payment of ſalvage; yet the inſured ſhall recover as for a total loſs.

Dean v. *Dicker*, at N. P. 2 Str. 1250.

her paſſage was taken by a *Spaniſh* privateer, and carried into a port in *Spain*, kept there eight days, and then cut out by an *Engliſh* ſhip.—The plaintiff inſiſted that this inſurance, though on goods, was to be conſidered as a wager on the bottom of the ſhip, and therefore, he was intitled to recover as for a total loſs.—The defendant ſaid, that, by the ſtat. 13 *G.* II. c. 4. the ſhip and cargo were to be reſtored to the owners upon paying ſalvage *(a)*; and that this was only an average loſs, and the plaintiff could only recover in the caſe of a total loſs.—Lord C. J. *Lee* held, that the plaintiff was entitled to recover: For this was a wager upon a total loſs, and here had happened one, by the ſhip's being carried into port, and there detained eight days: That where the policy is, "*intereſt or no intereſt*," the proviſions of the act, in caſes of valued policies, could not take place: That the act does not declare that the property is not gone by ſuch a capture, but only provides for reſtoring the ſhip to the *former owner*: But, that it might be otherwiſe, where the ſhip was re-captured before ſhe was carried *infra præſidia*; or in caſe of goods actually on board, and upon a valued policy.

A captured ſhip is inſured *intereſt or no intereſt*, retaken after 12 days, and ſold by the owner to pay the ſalvage; yet this is a total loſs.

Whitehead v. *Bance*, at N. P. B. R. Mich. 1749. *Park* 77.

So, where an inſurance was made on a ſhip "*intereſt or no intereſt, free of average*, &c. from *Jamaica* to *Hull*." —In her voyage ſhe was taken by a *French* privateer, and carried into *Hamburgh*; and after being twelve days in the hands of the enemy, was retaken by an *Engliſh* ſhip, and brought to *London*, where ſhe was adjudged to be reſtored to the owner, paying ſalvage. The owner ſold the ſhip and paid the ſalvage.—In an action on the policy, this was holden to be a loſs of the voyage (*b*); and a verdict was given accordingly.

The effect of a capture and recapture in diveſting or reveſting property.

But though no queſtion can now ariſe, between the inſured and the inſurer, as to the effect of a capture or recapture in diveſting or reveſting the property; yet, as it may ſometimes be of importance, in matters of inſurance to know how the law ſtands on the ſubject, it may not be improper, in this place, to enquire ſhortly,

(*a*) Vid. inf. § 7, how ſalvage is at preſent regulated.—(*b*) By the *loſs of the voyage* is here to be underſtood a *total loſs*.

when

when a capture ſhall be deemed to transfer the property to an enemy, and what ſhall be the effect of a re-capture in reveſting it in the original owner.

Voet on the pandects, and ſeveral authors he refers to, maintain with great earneſtneſs, *per ſolam occupationem, dominium prædæ hoſtibus acquiri.* (*a*). But the general opinion ſeems to be, that by the law of nations, the property of things captured in war is changed when all reaſonable hope of recovering them is gone; and, with reſpect to things moveable, all reaſonable hope of recovering them is preſumed to be gone when they are brought within the protection of the enemy's fortreſs (*b*).

Opinions of different authors on this ſubject.

But what cuſtody of ſhips or effects taken at ſea, ſhall be equivalent to a placing of things captured on land *infra præſidia*, is a ſubject of much doubt and diſpute. *Grotius* ſays, that ſhips or goods taken at ſea become the property of the captors, when they are brought into the enemy's harbours, or to the place where his whole fleet is ſtationed; for then all hopes of recovering them may be ſaid to vaniſh. But, he adds, that by the law of nations as introduced among *European* ſtates in more modern times, things are conſidered as captured when they have been 24 hours in the power of the enemy (*c*).

Bynkerſhoeck, and ſeveral writers whom he follows, abſolutely deny this pretended rule of the law of nations,

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(*a*) *Voet*, lib. 49, tit. 15, vol. 2, p. 1155.—(*b*) Cæterum in hâc belli quæſtione, placuit gentibus, ut cepiſſe rem is intelligatur qui ita detinet ut recuperandi ſpem probabilem alter amiſerit, aut ut res perſecutionem effugerit. Hoc autem in rebus mobilibus ita procedit, ut capta dicantur ubi intra fines, id eſt præſidia hoſtium, perducta fuerint. *Grot.* de jur. bel. ac pac. lib. 3. c. 6. § 3. Vid. *March* Rep. 110.—(*c*) Cui conſequens eſſe videtur, ut in mari navis et res aliæ captæ cenſeantur tum demum cum in navalia aut portus, aut ad eum locum ubi tota claſſis ſe tenet, perductæ ſunt.—Nam tunc deſperari incipit recuperatio. Sed recentiori jure gentium inter *Europæos* populos introductum videmus, ut talia capta cenſeatur ubi per horas viginti quatuor in poteſtate hoſtium fuerint. *Grot.* ubi ſup.—Vid. *Conſolato del Mare*, c. 283, 287. *Roccus*, not. 66.

and

and inſiſt on the rule of the *Roman* law, that the prize muſt be carried *infra præſidia* before it can become the property of the captor; and by *præſidia* he underſtands the *camps*, the *ports*, the *towns*, and the *fleets*, of the enemy (*a*).

Other writers have drawn other lines, by arbitrary diſtinctions, partly from policy, to prevent too eaſy a diſpoſition to neutrals, and partly from equity, to extend the *jus poſtliminii*, or the right of reclaiming what has been recovered from the enemy, in favour of the original owner. No wonder, therefore, that there is ſo much uncertainty, and ſuch a variety of notions among them about fixing a poſitive boundary by the mere force of reaſon, where the ſubject matter is arbitrary, and not the ſubject of reaſon alone (*b*).

How conſidered by the law of *England*.

In our courts of admiralty it has always been holden that, by the marine law of *England*, independent of the ſtatute which commands reſtitution, and fixes the rate of ſalvage, the property is not changed in favour of a vendee or recaptor, ſo as to bar the original owner, *till* there has been a regular ſentence of condemnation: And in the reign of King *Charles* the Second, a ſolemn judgment was given upon this point; and reſtitution of a ſhip taken by a privateer was decreed, after ſhe had been fourteen weeks in the enemy's poſſeſſion, *becauſe ſhe had not been condemned* (*c*). The ſame doctrine has, in ſeveral inſtances prevailed in our courts of common law (*d*). In one caſe it was holden that nine days poſſeſſion by the captor, and in another, that four years poſſeſſion, and ſeveral voyages performed, will not change the property, without a ſentence of condemnation (*e*).

(*a*) Vid. *Bynk.* jur. pub. lib. 1, c. 4.—(*b*) Vid. Lord *Mansfield*'s judgment in *Goſs* v. *Withers*, 2 *Bur.* 695.—(*c*) Cited by Lord *Mansfield* as a caſe reported to him by Sir Geo. *Lee*. Vid. *Goſs* v. *Withers*, 2 *Bur.* 695.—(*d*) *Aſſievedo* v. *Cambridge* 10 Mod. 79.—(*e*) —— v. *Sands*, 10 Mod. 79. See Lord *Mansfield*'s obſervations on theſe caſes, 2 *Bur.* 695. The caſes themſelves are ſo defectively reported, that I have not thought them worthy of a more particular notice.

In

In general, whenever a ſhip is taken by the enemy, the inſured may abandon, and demand as for a total loſs; and he is not bound to make any claim or appeal in the enemy's courts of admiralty, or to litigate there the validity of the capture *(a)*.

In every caſe of capture the inſured may abandon.

But the inſured is in no caſe *bound* to abandon; and, as the law now ſtands, no capture by the enemy can be ſo total a loſs as to leave no poſſibility of recovery, for the *jus poſtliminii* continues for ever, except in the caſe of a captured ſhip converted into a ſhip of war *(b)*. If the owner himſelf ſhould retake his ſhip or goods, he will be fully entitled to them; and if they be retaken at any time, whether before or after condemnation, he will be intitled to reſtitution, upon payment of a ſettled ſalvage *(c)*. —In what caſes the inſured may abandon and demand as for a total loſs though the ſhip be recaptured and reſtored, or otherwiſe recovered by the inſured, will be found fully explained in the ſecond ſection of the enſuing chapter on abandonment.

But he is not *bound* to abandon.

The chance of the owner's recovering his property, does not, however, ſuſpend the demand of the inſured, as for a total loſs: But in the caſe of a recapture, juſtice is done to the inſurer by putting him in the place of the inſured. In queſtions upon policies of inſurance, the nature of the contract as an *indemnity*, and nothing elſe, is always liberally conſidered *(d)*.

If he do abandon, the inſurer, in caſe of recapture, will ſtand in his place.

When there has been a capture, whether legal or not, and the ſhip has been recaptured or reſtored, the inſurer is bound to defray all neceſſary expences which the inſured has been put to for the recovery of his property. He is therefore liable for a ſum of money paid by the inſured to the captors, as a *compromiſe* made *bonâ fide*, to prevent the ſhip from being condemned as prize.

The inſurer is liable for all fair charges occaſioned by the capture.

(a) 2 *Bur.* 696. Adm. in *Tyſon* v. *Gurney*, 3 T. R. 479. Vid. poſt. ch. 14, § 1.—*(b)* Vid. Stat. 33 *G.* III., c. 66, § 42.—*(c)* Vid. ſtat. 29 *G.* II, c. 34, § 24, and 33 *G.* III. c. 66, § 42. Inf. ch. 14, § 1.—*(d)* Vid. Lord *Mansfield's* judgment in *Goſt* v. *Withers*, 2 *Bur.* 696, 7.

Thus:

A ſhip warranted neutral is captured as an enemy's ſhip; and the owners, after an interlocutory decree againſt them, agree to a compromiſe: This being done *bonâ fide*, the inſurer is liable for the ſum paid by the inſured under ſuch compromiſe.

Berens v. *Rucker*, at N. P. 1 Bl. 313.

Thus:—The *Dutch* ſhip *Tyd* and her cargo were inſured "At and from *St. Euſtatia* to *Amſterdam*, warranted *Dutch* property, and not laden in any *French* port in the *Weſt Indies*."—In *May* 1758 the ſhip took in a cargo of ſugars, indigo, and other *French* commodities, partly out of barks, partly from the ſhore. On the 18th of *June* ſhe ſailed on her voyage, and on the 27th was taken by an *Engliſh* privateer, and carried into *Portſmouth*. Proceedings in the court of admiralty were begun in *Auguſt*, and after many delays and citations from court to court, an interlocutory order was pronounced, in *February* 1759, for the contumacy of the claimants in not ſpecifying what part of the cargo was taken from the ſhore, what from barks; and it was decreed that the goods ſhould be preſumed *French* property. There was an appeal to the lords commiſſioners of prizes, but as many cauſes ſtood before it, the market very high, and the cargo in part periſhable, the agent of the owners agreed with the captors to give them 800 l. and coſts to obtain the reverſal of the ſentence. This was obtained by conſent, and it was decreed that there was a ſufficient cauſe of ſeizure, in order to give coſts to the captors, and reſtitution was decreed to the owners. After the ſhip's arrival at *Amſterdam*, the chamber of inſurances there ſettled the average of the loſs and expences occaſioned by the capture, detention and litigation; and for this the action was brought.—Lord *Mansfield* ſaid;—"The firſt queſtion is, whether this was a juſt capture *(a)*. Both ſentences are out of the caſe, being done and undone by conſent. The capture was unjuſt. The pretence was, that part of this cargo was put on board off *St. Euſtatia*, out of barks ſuppoſed to come from the *French* iſlands, and not loaded immediately from the ſhore. It is now a ſettled point, that it is the ſame thing as if they had been landed on the *Dutch* ſhore, and put on board afterwards, in which caſe there is no colour for ſeizure. The

If the produce of an enemy's country be brought from thence in barks and put on board a neutral ſhip; this will be the ſame as if the goods had been ſhipped from the ſhore in a neutral port. But a neutral ſhip,

(*a*) This became a queſtion, on account of the warranty that the ſhip and cargo were *Dutch* property; for if the capture had been juſt, it would have fulfilled the warranty.

rule

rule is, that if a neutral ſhip trade to a *French* colony, with all the privileges of a *French* ſhip, and is thus adopted and naturalized, it muſt be looked upon as a *French* ſhip, and is liable to be taken. Not ſo, if ſhe have only *French* produce on board, without taking it in at a *French* port; for it may be purchaſed of neutrals.—The ſecond queſtion is, whether the owners have acted *bonâ fide* and uprightly, as men acting *for themſelves*, and upon a reaſonable footing; ſo as to make the expences of this compromiſe a loſs to be borne by the inſurers. The judge of the admiralty's order to ſpecify was illegal; contrary to the marine law, and to the act of parliament which is declaratory of the marine law: Becauſe, if they had ſpecified, it would be of no conſequence, according to the rule before-mentioned. Yet the captors were in poſſeſſion of a ſentence, though an unjuſt one. And a court of appeal cannot, or ſeldom does, give coſts or damages which have accrued ſubſequent to the original ſentence; for thoſe damages ariſe from the fault of the judge, not of the parties. Under all theſe circumſtances, therefore, the owners did wiſely to offer a compromiſe. The cargo was worth 12,000 l.; the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negociated the compromiſe. The chamber of commerce at *Amſterdam* ratified it, and thought it reaſonable. Had the whole ſentence been reverſed, the coſts muſt have fallen heavy on the owners. I therefore think the inſurers liable to anſwer this average loſs, which was ſubmitted to, to avoid a total one." The jury found for the plaintiff.

trading to an enemy's colony, with all the advantages of an enemy's ſhip, is liable to capture.

Formerly it was a common practice to ranſom *Britiſh* ſhips, when captured by an enemy, by delivering to the enemy what was called a ranſom bill, which ſecured to the captor the price agreed upon, and operated as a bill of ſale of the ſhip and cargo to the original owners, and as a protection to the ſhip againſt other cruiſers of the enemy during the remainder of her voyage. A hoſtage was delivered to the captor to ſecure to him the punctual payment of the ſtipulated ſum.

Of ranſoming captured ſhips.

This

Actions at common law were formerly maintained on ranſom bills.

This ranſom bill, independent of the hoſtage, was conſidered as a contract of the law of nations, and obligatory upon the owners as well as upon the captain and hoſtage who ſigned it *(a)*; and actions have been often brought upon them in our courts of common law. And where the ſhip or goods were inſured, the amount of the ranſom was uſually taken to be the meaſure of the demand of the inſured upon the underwriters in reſpect of the capture *(b)*.

But it was at length determined that an alien enemy could not ſue for any right acquired by actual war.

Anthon v. *Fiſher*, *Doug.* 648, 9.

In the caſe of *Anthon* v. *Fiſher*, which was an action on a ranſom bill, and came before the court of King's Bench in *Trinity* Term 1782, it was contended on the part of the defendant, that as queſtions on ranſom bills ariſe out of *matter of prize*, and are to be decided therefore by the *jus belli*, ſuch queſtions are not triable in any court of common law, but belong excluſively to the courts of prize. The judges of the court of King's Bench differed in opinion upon this queſtion, there was judgment for the plaintiff in that court *pro forma*, and the cauſe being removed by writ of error to the *Exchequer Chamber*, it was there unanimouſly determined, that an alien enemy cannot, by the municipal law of this country, ſue for the recovery of a right claimed to be acquired by him in actual war, and the judgment of the Court of King's Bench was reverſed.

And now, by ſtat. 22 *G.* III. c. 35, it is declared unlawful to ranſom any *Britiſh* ſhip taken by the enemy.

But this practice of ranſoming ſhips captured by the enemy being found to operate more to the diſadvantage than for the benefit of this country, it was at length thought proper to prohibit it altogether. And therefore by ſtat. 22 *G.* III. c. 25. § 1. it is enacted, 'That it 'ſhall not be lawful for any of his Majeſty's ſubjects 'to ranſom, or to enter into any contract or agreement 'for ranſoming any ſhip or veſſel belonging to any of

(*a*) Si quid ſinguli hoſti promiſerint, eſt in eo fides ſervanda. *Cic.* Vid. *Burlamaqui*, part 4, ch. 4. *Vattel*, liv. 3, ch. 16, § 233. *Grot.* lib. 3, ch. 21, § 1.—(*b*) Vid. *Ricord* v. *Bettenham*, 3 *Bur.* 1734, 1 *Bl.* 563. *Cornu.* v. *Blackburne*, *Doug.* 619.

'his Majeſty's ſubjects, or any merchandizes or goods 'on board the ſame, which ſhall be captured by the ſub- 'jects of any ſtate at war with his Majeſty, or by any 'perſon committing hoſtilities againſt his Majeſty's ſub- 'jects.' By § 2. 'All contracts and agreements which 'ſhall be entered into, and all bills, notes, and other ſe- 'curities, which ſhall be given by any perſon or perſons 'for ranſom of any ſuch ſhip or veſſel, or of any mer- 'chandize or goods on board the ſame, ſhall be abſo- 'lutely void in law, and of no effect whatever.' And, by § 3, a penalty of 500 l. is given to the informer, for every offence againſt the act. This ſtatute has put an end to all queſtions on the law of ranſoms.

If a ſhip be recaptured before ſhe is carried into an enemy's port, ſhe may, with the conſent of the recaptors, proſecute her original voyage.

It often happens that a recaptured ſhip is in a ſtate to proſecute her original voyage; and, in that caſe, it is the intereſt of the recaptors, as well as of the other parties concerned, that ſhe ſhould be permitted to do ſo. The laſt prize act (*a*) has therefore very properly provided, 'That if a ſhip be retaken before ſhe has been carried 'into an enemy's port, it ſhall be lawful for her, if the 'recaptors conſent thereto, to proſecute her voyage; and 'it ſhall not be neceſſary for the recaptors to proceed to 'adjudication till ſix months after the recapture, or till 'the return of the ſhip to the port from whence ſhe 'ſailed; and the maſter, owners, or agents, with the 'conſent of the recaptors, may diſpoſe of their cargoes 'before adjudication: And in caſe the veſſel ſhall not re- 'turn to the port from whence ſhe ſailed, or the recaptors 'ſhall have had no opportunity of proceeding regularly to 'adjudication within the ſix months, on account of the 'abſence of the ſaid veſſel, the court of admiralty ſhall, at 'the inſtance of the recaptors, decree reſtitution to the 'former owners, they paying ſalvage, upon ſuch evi- 'dence as to the court ſhall, under all the circumſtances 'of the caſe, appear reaſonable; the expence of ſuch pro- 'ceeding not to exceed *fourteen pounds*.'

And the recaptors ſhall not be obliged to proceed to adjudication, till after ſix month, or the return of the ſhip.

(*a*) Stat. 33 *G.* III, c. 66, § 44.

Sect. 5.

Of Loſs by Detention of Princes.

BY the terms of the policy the inſurer is anſwerable for all loſs occaſioned by "*arreſts or detainments of all* "*kings, princes, and people, of what nation, condition, or* "*quality ſoever.*" Under theſe words, which are nearly the ſame in the policies of all the maritime countries of *Europe*, the inſurers are liable for all loſſes occaſioned by arreſts or detention by the authority of any prince, or public body claiming to exerciſe ſovereign power, under what pretence ſoever.

What ſhall be deemed an arreſt and detention of princes.

As if the ſovereign of the country to which a ſhip belongs, or any other ſovereign, not at war with him, from motives of neceſſity, not of hoſtility, arreſt the ſhip either ſingly, or together with others in the ſame port or harbour; this is a detention of princes (*a*).

Difference betwe n capture and arreſt of princes.

There is an obvious difference between capture and arreſt of princes: The object of the one is prize; that of the other detention, with a deſign to reſtore the ſhip or goods detained, or to pay the value to the owner. And though neither of theſe ſhould be done, ſtill it muſt be conſidered as an arreſt of princes, becauſe the character of any action depends on the original deſign with which it was done.

If a ſhip be detained, upon a war bre king out; this is *capture*, not an arreſt.

When a ſhip is detained in a port after a declaration of war, or the iſſuing of letters of repriſal; this more reſembles *a capture* than a detention, and gives the inſured an immediate right to abandon, as for a loſs by capture, even though no condemnation be pronounced, and though the ſhip be afterwards reſtored (*b*).

An arreſt of princes may be at ſea as well as in port.

An arreſt of princes may be at ſea as well as in a port or harbour, provided it be done from public neceſſity, not with a view to plunder. *Roccus* (*c*) mentions

(*a*) Vid. *Le Guidon*, ch. 7, art. 6, and ch. 9, art. 6 and 13; *Valin*, tom. 2. p. 416.—(*b*) Vid. *Pothier*, h. t. n. 56.—(*c*) h. t. n. 60.

the

the caſe of a *Genoeſe* ſhip laden with corn, which was ſeized *at ſea* by the *Venetian* gallies, and carried into *Corfu*, where there was a famine at the time, and there ſold and paid for.—The inſured inſtituted a ſuit in the *Rota* of *Genoa* againſt the inſurers, and inſiſted that this was a *capture* for which they might abandon. The inſurers anſwered that this was merely a *detention of princes*, the object of which was, not to capture the ſhip, but to purchaſe the corn which the neceſſity of the public required. *Diverſio facta fuit, non ad capiendam navim, ſed ob publicam utilitatem grani conſequendi cauſâ. Licuit frumenta accipere, ſoluto pretio.*—This was held to be a good defence.

Seizing a corn ſhip at ſea, for the relief of a place ſuffering under a famine, is only an arreſt of princes, not a capture.

And yet, if a neutral ſhip be arreſted at ſea, and carried into a port belonging to one of the belligerent powers, under pretence that ſhe belongs to the enemy, or that ſhe is laden with enemy's goods; this muſt be conſidered as a *capture*, becauſe it is done *as an act of hoſtility*; and the ſhip's being afterwards reſtored, will not change that which was originally a capture into a detention of princes *(a)*.—But in the caſe of *Saloucci* v. *Johnſon*, already particularly mentioned *(b)*, the court of King's Bench determined, that the refuſal of a neutral to ſubmit to a ſearch by a *Spaniſh* ſhip of war, and reſiſting with force, was no forfeiture of the ſhip's neutrality; and that the ſhip being arreſted and carried into *Spain* for this reſiſtance, the inſured was intitled to recover againſt the underwriters as for "*an improper detention.*" And though it has ſince been determined, both in the court of King's Bench and the court of admiralty, that reſiſting a ſearch is a lawful cauſe of capture and confiſcation *(c)*, yet the above caſe of *Saloucci* v. *Johnſon*, may nevertheleſs, I conceive, be conſidered as an authority to prove that if a neutral ſhip be *unlawfully* arreſted and detained by a belligerent cruiſer for any pretended offence againſt the law of nations, this would be a detention of princes.

But if a neutral be taken at ſea, under pretence that ſhe is an enemy, this is a capture.

If ſhe be unlawfully arreſted under pretence that ſhe committed ſome offence againſt the law of nations; this is an arreſt of princes.

(*a*) *Emerig.* tom. 1, p. 537.—(*b*) Sup. 301.—(*c*) Sup. 303.

But it a ſhip be ſeized for navigating againſt the laws of a foreign ſtate; this is not a detention of princes.

But if a ſhip miſconduct herſelf; as by navigating againſt the laws of a foreign country, which ſhe is bound to obſerve, or for not paying cuſtoms, &c. and thereby ſubject herſelf to ſeizure or confiſcation; this ſhall not be deemed a loſs by reſtraint or detention of princes (*a*); though, perhaps, it may amount to barratry of the maſter (*b*).

An embargo is the moſt frequent cauſe of detention.

The moſt frequent cauſe of detention is an embargo, which is a proclamation or order of ſtate, uſually iſſued in time of war or threatened hoſtilities, prohibiting the departure of ſhips or goods from ſome or all of the ports of ſuch ſtate until further order. An embargo laid on ſhips and merchandize in the ports of this kingdom by virtue of the king's proclamation, is ſtrictly legal, when the proclamation does not contravene the ancient laws, or tend to eſtabliſh new ones; but only to enforce the execution of ſuch laws as are already in being, in ſuch manner as the King ſhall judge neceſſary (*c*).

This, whether legal or not, is a detention within the policy.

But it is needleſs, in this place, to enlarge upon the right of our own ſovereign, or that of any other, to lay embargoes. For whether an embargo be legally or illegally laid, the injury to the owner, by the detention of his ſhip or goods, is the ſame; and the inſurer is equally liable for the loſs occaſioned by it.

The word *people* in the policy means *a* people, or nation, not a mob of lawleſs rabble.

By the word *people* in the policy is not to be underſtood any promiſcuous or lawleſs rabble that may be guilty of attacking or detaining a ſhip: The following caſe will ſhew that it means *a* people; that is, a nation in its collective and political capacity.

A ſhip is forcibly ſeized by a tumultuous rabble: This is a loſs by pirates, but not by detention of a people.

A cargo of corn and coals was inſured from *Youghall* to *Sligo*, in *Ireland*.—The firſt count of the declaration, in deſcribing the loſs, ſtated that the ſhip, by ſtreſs of weather, was forced into *Elly Harbour*; where ſhe was, with force and violence, attacked, boarded, arreſted, and detained, *by people to the plaintiff unknown*; by reaſon whereof the corn was wholly loſt. In the ſecond count it was ſtated that

Neſbit v. *Luſhington*, 4 T. R. 783.

(*a*) Per Lord Commiſſioner *Hutchins*, 2 *Vern.* 176.—(*b*) Vid. *Saloucci* v. *Johnſon*, ſup. 301.—(*c*) 3 Inſt. 162, 4 Mod. 177, 179, 1 *Bl.* Com. 270.

the

the ſhip being in *Elly Harbour*, was with force and violence attacked and boarded, ſeized and taken, by certain *pirates* to the plaintiff unknown, whereby the corn was wholly loſt.—The policy was in the uſual form.—It appeared that the ſhip was forced by ſtreſs of weather into *Elly Harbour*; and there happening to be a ſcarcity of corn there at the time, the people came on board the ſhip in a tumultuous manner, and would not leave her till they had forced the captain to ſell all the corn at a certain price, except 10 tons which was ſpoiled by the ſtranding and thrown overboard. The ſhip afterwards arrived at her deſtined port, with the coals. The court determined that this was a capture by pirates, and not a loſs within the meaning of the words arreſts, &c. of kings, princes, and *people*.—Lord *Kenyon* ſaid the word *people* meant *the ruling power of the country*. Mr. Juſtice *Buller* ſaid it meant the *ſupreme power of the country*, whatever that might be. This, he ſaid, appeared by another part of the policy; for where the wrongful acts of *individuals* are mentioned, they are deſcribed by the names of *pirates*, rogues, thieves. Then, having ſpecified all the *individuals* againſt whoſe acts the inſurance is made, it ſpecifies thoſe occaſioned by the acts of "kings, princes, and *people* of what nation, condition or quality ſoever; which muſt apply to "nations," in their collective capacity *(a)*.

If a *Britiſh* ſhip be arreſted or ſeized by the authority of the *Britiſh* government, from ſtate neceſſity; this ſhall be a detention within the meaning of the policy, for which the inſurer is liable *(b)*.

If a ſhip be ſeized by authority of the *Britiſh* government; this is a detention within the policy.

(a) *Roccus*, (h. t. n. 54), in the following paſſage, ſeems to interpret the uſual words of the policy in a larger ſenſe than that to which they are here reſtricted:—Si merces captæ a poteſtate, ſeu judice juſtitiam adminiſtrante in illo loco, aut a populo *aut ab alia quacunque perſona*, per vim, abſque pretii ſolutione, tenentur aſſecuratores ſolvere æſtimationem dominis mercium, factâ prius per dominos mercium ceſſione ad beneficium aſſecuratorum, pro recuperandis illis mercibus, vel pretio ipſorum a capientibus.—*(b)* Vid. *Emerig.* tom. 1, p. 541. Ord. de la mar. h. t. 52. and *Valin*, tom. 2, p. 134.

A *Britiſh ſhip* is ſeized at *Jamaica*, and converted into a fire-ſhip by the government there: It ſeems the inſurer is liable.

Green v. *Young*, at N. P. 2 Lord *Ray.* 640, *Salk.* 444.

As, where a ſhip was inſured, "from her arrival at —— "in *Jamaica*, and during her voyage to *London*:"—An embargo was laid on the ſhip by the government, who afterwards ſeized her, and converted her into a fire ſhip, and offered to pay the owners.—The queſtion was whether this would excuſe the inſurers. Lord C. J. *Holt* ſeemed to be of opinion that it would not; and that this was within the words *detention of princes, &c.* But he gave no abſolute opinion, becauſe the cauſe was referred.

If a ſhip, inſured *at and from* a certain port, be arreſted *in* that port, this is an arreſt within the policy.

So, if a ſhip be inſured "*at and from*" a given port, a detention by public authority, in that port, is a detention within the words of the policy. For the words of the policy being large enough to cover this riſk, nothing but ſome expreſs law or uſage to the contrary can exempt the inſurer (*a*).

Thus:

(*a*) Some doubt ſeems to have been entertained on this point. *Roccus*, n. 65, ſays, "Regis et principis factum connumeratur inter caſus fortuitos; ideo, ſi rex et princeps retineant navem oneratam frumenta aſportare ad locum deſtinatum, tenentur aſſecuratores." This paſſage, and that which precedes it, plainly ſhew that the author meant a detention by the power under whoſe authority the ſhip was to ſail. *Le Guidon*, c. 7, § 1, treating of abandonment, ſays, that the inſured may abandon, "quand il advient du tout ou de partie, ou bien avarie qui excede ou endommage la moitié de la marchandiſe, *quand il y a priſe d'amis ou d'ennemis*, arret de prince, &c." The ord. de la mar. h. t. art. 52, contains theſe words. "Si le vaiſſeau étoit arrêté en vertu de nos ordres dans un des ports de notre royaume, *avant le voyage commencé*, les aſſureurs ne pourront, á cauſe de l'arrêt, faire l'abandon de leurs éffets aux aſſureurs." *Valin*, commenting upon this article, (vol. 2, p. 134), diſtinguiſhes the arreſt of a foreign prince, from that made by order of the King of *France*; he alſo diſtinguiſhes an arreſt in the port of loading, from an arreſt in any other port of *France*, where the ſhip happens to put in; and he ſays that only in the latter caſe an arreſt by the King is a ground to abandon. But *Pothier* (h. t. n. 59), and after him, *Emerigon* (vol. 1, p. 541), reject theſe diſtinctions, and maintain that the words, "*avant le voyage commencé*," mean before the *riſk* is commenced; and that if

Thus:—An insurance was made on three ships, *Adelaide*, *Adéle*, and *Victor*, their stores, &c.: Upon two of them, "*At and from L'Orient*;" and upon the third, "At, and from, and after, her arrival "at *L'Orient*;" and upon all of them, "To all ports, seas, and "places whatsoever beyond, and on this side, the *Cape* "*of Good Hope* and *Cape Horn*, on the southern whale "and seal fishery and trade, and until their arrival back "at *L'Orient*."—An action being brought on this policy, the loss was stated in the declaration to have happened by the ships, their stores and provisions, being, by the authority of certain persons exercising the powers of government in *France*, at *Port Louis* with respect to one, and at *L'Orient* with respect to the two others, *arrested and restrained* from further prosecuting their voyages.—The *Adeleide* sailed from *L'Orient* on the voyage insured, but was obliged to put back by stress of weather, into *Port Louis*; and on the 5th of *February* 1793, while she lay there, the *Adéle* and *Victor* were preparing for their voyages, and before the necessary passports and clearances

A neutral ship and stores are insured *at and from* an enemy's port, and an embargo is there laid on by the enemy. This is an arrest of princes.—And if the embargo continue, the insured may abandon and recover as for a total loss.

Rotch v. *Edie*, 6 T. R. 425, sup. 25.

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if the risk be commenced before the arrest, the insured may abandon, upon an arrest even in the port of loading. *Le Guidon*, however, (ch. 9, art. 6), contains these words. "Si le prince arrêste le navire, comme s'il s'en voulouit servir; s'il avoit affaire de portion ou de toute la marchandise; s'il ne veut permettre aux navires de sortir qu'en flotte, ou rédoublement d'équipage, ou s'il prévoyoit à plus grand danger les arrestans pour quelque temps, l'assureur n'est en aucune indemnité quand telle chose avient dedans le même port, pour ce que ce sont *des dangers de la terre*, procedans du vouloir du prince."—Upon this passage of *Le Cuidon*, *Valin* (ubi sup.) observes, that whatever may be the King's motive for stopping the departure of a ship, the insurer has no right to abandon, but must wait till the king has withdrawn his orders, and it may be considered as one of the extraordinary and unforeseen events by which a voyage may be prolonged beyond its usual time. Lord *Mansfield*, in *Goss* v. *Withers*, 2 *Bur.* 696, seems to have adopted the doctrine as laid down by *Roccus*, and followed by *Pothier* and *Emerigon*; namely, that the insured may abandon in the case of a mere arrest, or an embargo, by any prince. Vid. post. chap. 14, on abandonment.

could be obtained, an embargo was laid on all veſſels in thoſe ports. The *Adelaide* was brought back to *L'Orient*, the periſhable ſtores of all three ſhips were ſold, and the ſhips themſelves, with the reſt of the ſtores, remained at *L'Orient* under the embargo, which ſtill continued on all ſhips, deſtined for long voyages. The *Adéle* and *Victor* had entered outward upon their reſpective voyages, when the embargo came; and that alone prevented them from ſailing. Notice of abandonment was given to the underwriters, on the 27th of *February* 1793, and a total loſs claimed, and the ſame repeated in *Auguſt* following. The plaintiff, who then reſided in *England*, was a ſubject of the the United States of *America*, and formerly reſided ſeveral years in *London*, but, for ſome years previous to the inſurances in queſtion, had dwelt at *L'Orient*, and was jointly concerned in the Southern whale fiſhery with Mr. *Berard* a native of *France*, reſident at *L'Orient*, and whoſe intereſt was ſeparately inſured.—On the trial of the cauſe a ſpecial caſe, ſtating the above facts, was reſerved for the opinion of the court; and it was contended on the part of the underwriters,—1ſt, That an embargo at the loading port to which the ſhip belonged, and where the inſured owed a temporary allegiance to the governing power, was not a riſk within the meaning of the policy, becauſe like ſea-worthineſs, it is a condition neceſſarily implied in the contract of inſurance, that the ſhip may legally ſail from the loading port. 2dly, That there was no loſs in regard to the ſubject-matter of the inſurance, which is on the ſhip, &c. 3dly, That the plaintiff had no right to abandon as for a total loſs, under the particular circumſtances of this caſe.—The court, however, determined in favour of the plaintiff on all theſe points.—As to the *firſt*, they held, that the terms of the policy were ſufficiently large to extend to this caſe; and that it was incumbent on the defendant to have ſhewn ſome caſe in which it was otherwiſe decided; but all the authorities, both *Engliſh* and foreign, were in favour of the plaintiff. That the plaintiff was not an alien enemy, but a native of *America*, then reſident in *England*, and therefore under no

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diſability to ſue in this caſe, and the conſequence of allowing this objection, would be to render it illegal to inſure the property of a neutral, in an enemy's port. As to the *ſecond* point, the court held that as the inſurance was not only on the ſhip, but on the ſtores, proviſions, and fiſhing tackle, which were loſt to the plaintiff; and as the voyage was loſt in conſequence of the detention of the ſhips, this was a loſs within the policy, and a very different caſe from that of *Robertſon* v. *Ewer* (*a*), to which it had been compared.—Upon the laſt point, the court was of opinion, that the plaintiff had as much right to abandon in this caſe, as in the caſe of a capture by an enemy; and for this the doctrine of Lord *Mansfield* in *Goſs* v. *Withers* (*b*) was much relied on.

A ſeizure, after a ceſſation of hoſtilities; is an arreſt of princes.

If a ſhip be ſeized after a ceſſation of arms and preliminary articles of peace are ſigned, this ſhall not be deemed a capture, but only an arreſt of princes.

An *Engliſh* ſhip is ſeized by the *Spaniards*, and converted by them into a ſhip of war: But it appearing that this was after a ceſſation of arms, and preliminary articles of peace ſigned, and the ſhip having been reſtored; this was held not to be a capture, but only a detention of princes.

As, where the plaintiff had cauſed himſelf to be inſured "on the *Prince Frederick* from *Vera Cruz* to *London*, *in-*"*tereſt or no intereſt*, free of average, and without bene-"fit of ſalvage."—The ſhip was afterwards ſeized by order of the Viceroy of *Mexico*, and the *Spaniards*, having taken out the *South Sea* Company's arms, and made ſeveral alterations in her, turned her into a ſhip of war, and ſent her as commodore with a ſquadron of men of war to the *Havannah*, there being a war at that time between *England* and *Spain*; and *Gibraltar* was actually beſieged by the *Spaniards*.—In an action on the policy (*d*), the defendants proved the ſigning of the preliminary articles of peace before the ſeizure of the ſhip, and therefore inſiſted that this ſeizure did not alter the property, and conſequently the defendants were not liable: For if the pro-

Spencer v. *France*, at N. P. *December* 1736, *Beawes* 4th edit. p. 316 (*c*).

(*a*) 1 T. R. 127, inf. c. 17, § 5.—(*b*) 2 *Bur.* 583, inf. c. 14, § 2.—(*c*) This caſe, which is found in the 4th edition of *Beawes* but not in the 5th, is ſo imperfectly reported that it cannot be much relied on as an authority: Yet, being cited by Lord *Mansfield* in the caſe of *Hamilton* v. *Mendes*, 2 *Bur.* 1211, I thought it ought not to be paſſed unnoticed here.—(*d*) The plaintiff it may be preſumed declared only upon a loſs by *capture*.

perty

perty was not altered, this inſurance, made by the plaintiff without intereſt, could not bind; as nothing came within the policy but a total loſs: And though there be thoſe general words, "*reſtraint, or detainment of princes.*" —Lord C. J. *Hardwicke* declared that a war might begin without an actual declaration or proclamation, as in this caſe, by laying ſiege to *Gibraltar*; that as a war might begin by hoſtilities only, ſo it might end by a ceſſation of arms; and theſe preliminary articles being ſigned before the ſeizure of the ſhip, and there being a ceſſation of arms, he thought the taking of the ſhip afterwards not to be a taking by enemies, unleſs the jury took the capture to begin from the time the *South Sea* arms were taken out, which was before the articles: That ſuppoſing the ſhip not taken by enemies, whether the detention for near a year was, in this ſort of policy, viz. *intereſt or no intereſt*, a detention within the policy; or whether in ſuch policies, the inſurers are ever liable but in caſe of a total loſs; and if ſo, the ſhip being afterwards reſtored, he directed the jury to find for the defendants, which they accordingly did.

Sect. 6.

Of Loſs by Barratry.

Barratry defined. BARRATRY, (which is derived from the *Italian* verb *barratrare*, to cheat), may be defined to be, any ſpecies of fraud, knavery, deceit, or cheating, committed by the maſter or mariners, whereby the owners ſuſtain an injury: As by running away with the ſhip, wilfully carrying her out of the courſe of the voyage preſcribed by the owners, ſinking or deſerting her, embezzling the cargo, ſmuggling, or any other offence whereby the ſhip or cargo may be ſubjected to arreſt, detention, loſs, or forfeiture (*a*): Barratry, in ſhort, comprehends every fraud that may be committed by the maſter or mariners againſt the owners;

(*a*) Vid. *Saloucci* v. *Johnſon*, ſup. 301.

and

and therefore, where the breach aſſigned in the declaration on a policy was, the loſs of the ſhip, "by the *fraud and negligence* of the maſter," it was determined that this was a ſufficient averment of a loſs by barratry (*a*).

Whether inſurance againſt barratry ought in all caſes to be permitted.

At *Amſterdam*, *Hamburgh*, *Middleburgh*, and ſome other maritime towns, inſurers are, by *poſitive law*, made reſponſible for the barratry of the maſter and mariners (*b*). At *Rotterdam* the owners of ſhips are prohibited from inſuring againſt the barratry of the maſter whom they themſelves appoint. But they are permitted to inſure againſt his neglect; againſt the barratry of the ſailors, and of ſuch maſter as may ſucceed to the command in foreign parts without their knowledge, upon the deceaſe or abſence of the maſter originally appointed (*c*).

Lord *Mansfield* thought it extraordinary that barratry ſhould ever have crept into inſurances, and ſtill more that it ſhould have continued in them ſo long; thus making the underwriter become inſurer of the conduct of the captain whom he does not appoint, and cannot diſmiſs, to the owners who can do either (*d*).

Roccus (*e*) holds that the inſurer cannot be made liable for barratry, if the inſured be the owner of the ſhip; but if he only *charter* the ſhip, he may inſure againſt barratry; becauſe in that caſe, the owner of the ſhip appoints the maſter. But where the owner of the goods appoints the maſter, it is holden that he cannot be inſured againſt barratry (*f*).

In *France* the inſurer was formerly anſwerable, *ipſo jure*, for the barratry of the maſter (*g*). But, by the ordinance of the marine (*h*), this liability is confined to caſes, where the policy expreſsly includes barratry; and *Emerigon* (*i*) even inſiſts that the owner of the ſhip cannot be

(*a*) R. *Knight* v. *Cambridge*, 1 *Str.* 581, 2 Lord *Ray.* 1349, inf. ch. 17, § 2.—(*b*) 2 *Mag.* 73, 130, 215.—(*c*) Vid. *Roccus*, n. 27, *Emerig.* tom. 1, p. 370.—(*d*) 1 T. R. 330.—(*e*) h. t. n. 44.—(*f*) Quando navarcus poſitus eſt à domino mercium, tunc aſſecuratus ſibi debet imputare quod talem præpoſitum elegerit, et aſſecurator non tenetur. *Caſaregis*, diſc. 10, n. 14; diſc. 1, n. 75.—(*g*) Vid. *Le Guidon*, ch. 5, art. 6, ch. 9, art. 8, 12.—(*h*) h. t. art. 28.—(*i*) Vol. 1, p. 369.

inſured againſt barratry of the maſter, becauſe, he is himſelf anſwerable, according to the rule of the *Roman* law (*a*), for the conduct of the maſter whom he employs; and if the owner be himſelf anſwerable to third perſons for the barratry of the maſter, he cannot, *as inſured*, throw this burthen on the inſurer, who would have an immediate remedy againſt him, *as owner*, to recover back the ſame loſs; a circuity of action which the laws of no country would endure.

Upon the ſame principle *Emerigon* alſo holds that if the captain be commiſſioned to diſpoſe of an adventure on board, the inſurer of ſuch adventure ſhall not be anſwerable for the loſs of it, occaſioned by the fault of the captain; for this would be, to make the inſurer anſwerable to the inſured for the faults of his own agent (*b*).

But the objections to the policy of permitting inſurances againſt barratry, in the caſe of the *owner of the ſhip*, however well founded, do not apply to the inſurance of goods in a *general ſhip*, which carries the goods of every man who chuſes to put them on board; for, in that caſe, the owner of the goods does not appoint the maſter, nor has he any control over either him or the ſhip. It is probable that caſes like this, firſt gave birth to the practice of inſuring againſt barratry; and that this, in proceſs of time, was indiſcriminately introduced into all policies.

But even in the caſe of a *particular ſhip*, freighted entirely by a ſingle perſon, it may in general be preſumed that if the inſurer does not know the maſter, or at leaſt his character, it is his own fault, as every policy ſpecifies the maſter; but then it is generally provided that any other perſon, at the election of the inſured, may go as maſter; and by permitting this clauſe to ſtand in the policy, the inſurer waves all perſonal knowledge of the maſter, and therefore no objection can fairly be made of the want of ſuch knowledge (*c*).

(*a*) Omnia facta magiſtri debet præſtare qui eum præpoſuit ff. l. 1, § 5, de exercit. act. Ex delicto cujuſvis eorum qui navis navigandæ cauſâ in nave ſunt datur actio in exercitorem, id. § 2. —(*b*) *Emerig.* tom. 1, p. 370.—(*c*) Vid. *Roccus*, h. t. n. 27. *Cowp.* 153. Vid. ſup. 221.

And

And though barratry cannot properly be called a peril of the ſea, becauſe it does not ariſe *ex marinæ tempeſtatis diſcrimine*, yet it is a riſk, and a very great one, incident to ſea voyages, becauſe merchants are obliged to confide their ſhips and merchandize to the care of mariners, who may ſometimes ſo far forget their duty, as to betray the great truſt repoſed in them. Unleſs, therefore, the merchant could be protected by inſuring againſt this riſk, few men of ſmall capitals would expoſe themſelves to it. For this reaſon the law, with us, permits even the owner of the ſhip to be inſured againſt the miſconduct of the captain and crew, though they are his own agents, and the perſons of his own choice.

The captain may be inſured againſt the barratry of the ſailors.

If the captain be the inſured, no agreement on the part of the inſurers can make them liable for barratry committed by himſelf (*a*); but they may be liable, in ſuch caſe, for the barratry of the ſailors, in which he has no part (*b*).

Still, however, it muſt be owned that caſes ſometimes occur which tempt one to think that it might, perhaps, be the wiſeſt policy to impoſe ſome reſtraint upon unqualified inſurances by *owners of ſhips*, againſt this ſpecies of riſk. It would at leaſt have the effect of making them more circumſpect in the choice of the perſons to whom they confide ſo great a charge.

What ſhall be deemed barratry.

Valin (c) and *Pothier* (*d*), (adopting the doctrine of *Le Guidon* (*e*),) hold that barratry comprehends every fault, either of the maſter or mariners, by which a loſs is occaſioned, whether ariſing from fraud, negligence, unſkilfulneſs, or mere imprudence; and in this ſenſe it ſeems to be underſtood in the *French* ordinance of the marine (*f*).

A deviation not proceeding from fraud, is not barratry.

But with us, no fault of the maſter or mariners amounts to barratry, unleſs it proceed from an intention to defraud the owners of the ſhip (*g*). Therefore if the

(*a*) *Le Guidon*, ch. 15, art. 4; *Valin*, h. t. art. 27, p. 75; *Pothier*, h. t. n. 65.—(*b*) *Emerig.* tom. 1, p. 371.—(*c*) On art. 28, h. t. tom. 1, p. 79.—(*d*) h. t. n. 65.—(*e*) Ch. 5, art. 6, ch. 9, art. 1, 8.—(*f*) h. t. art. 28.—(*g*) Non omnis navarci culpa eſt barataria, ſed ſolum tunc ea dicitur, quando committitur cum præexiſtenti ejus machinatione, et dolo præordinato ad caſum. *Caſaregis*, diſ. 1, n. 77.

maſter

maſter, from *ignorance*, *unſkilfulneſs*, or from any motive which is not *fraudulent*, depart from the proper courſe of the voyage; this will be a deviation which will avoid the policy, but it will not amount to barratry.

In a voyage from *London* to *Jamaica*, the captain loſes his reckoning: and when he diſcovers his ſituation, inſtead of ſteering directly for *Jamaica*, bears up for an iſland out of that courſe: This is a deviation, but being without any fraudulent intention, is not *barratry*.

Phynn v. *Roy*. *Ex. Aſſur*. 7 T. R. 505.

Thus:—Goods were inſured from *London* to *Jamaica*, and it appeared that the captain's inſtructions were to proceed immediately to *Jamaica*: But after the ſhip had cleared the *Channel*, ſhe was carried by currents and other cauſes, out of her reckoning, till ſhe was found to be between the *Grand Canary* and *Teneriffe*. From this ſituation her direct courſe to *Jamaica* was to the ſouth-weſt, inſtead of which, the captain bore up for *Santa Cruz*, to the north-weſt about 30 miles, where ſhe came to an anchor. There, an embargo was laid upon her; ſoon after which, news arrived of war having been declared between *Spain* and *Great Britain*, and the ſhip and cargo were ſeized and condemned as prize.—In an action on the policy, the declaration contained two counts; one for a loſs by *capture*, the other for a loſs by *barratry*. And it was contended on the part of the plaintiff, that he was neceſſarily intitled to recover on one count or the other: On the firſt, if there was no deviation; or, admitting that the ſhip's going to *Santa Cruz* inſtead of proceeding to *Jamaica*, after the captain knew with certainty where he was, was a deviation, ſtill it was a wilful deviation by the captain, againſt his inſtructions, merely to procure a temporary refreſhment, and no benefit to the owners, and therefore an act of barratry.—Lord *Kenyon*, who tried the cauſe, ſaid, that it could not be barratry, without a fraudulent purpoſe in the captain at the time; and with that direction he left it to the jury, who found "that "the captain's going to *Santa Cruz* was a deviation, and "was owing either to ignorance or ſomething elſe, *but* "*that it was not fraudulent;*" and they accordingly found for the defendants.—Upon a motion for a new trial, the court were clearly of opinion that there muſt be *fraud* to conſtitute barratry; and as the jury had expreſsly negatived fraud, there could be no barratry.—Mr. Juſtice *Lawrence* ſaid he knew of no caſe in which it is ſaid that the act of the captain is barratry, merely becauſe it is againſt

againſt the intereſt of the owners; it muſt be done with a *criminal intent*: That, in this caſe, the jury having negatived fraud, had negatived criminality in the captain; and therefore this was not a barratrous deviation.

Whether barratry may be committed by the ſeamen without the participation, or againſt the will, of the captain.

In *France*, if by the policy the inſured be protected againſt the barratry of the *maſter*, the underwriters are anſwerable for the miſconduct of the *mariners* alſo; becauſe the word maſter (*patron*) comprehends all the perſons on board who are in the ſhip's pay (*a*). Our policies are more explicit, and diſtinctly ſpecify barratry of the maſter and *mariners*. I ſhould conceive, therefore, that with us, as in *France*, the mariners may commit barratry, without the concurrence of the maſter, or againſt his will. In the following caſe, however, Lord C. J. *Lee*, at *niſi prius* held, that a deviation to which the maſter was compelled by a very daring act of violence and diſobedience on the part of the ſeamen, did not amount to barratry, becauſe the ſhip was not actually *run away with in order to defraud the owners.*

A deviation, occaſioned by the diſobedience of the ſeamen, has been holden not to be barratry, unleſs it be done with intent to defraud the owners.

That was the caſe of a letter of marque, inſured for a voyage "from *Briſtol* to *Newfoundland.*"—She ſailed with expreſs orders that, if ſhe ſhould take any prize, ſhe ſhould nevertheleſs proceed on her voyage, and that ſome hands ſhould be put on board the prize, and ſent with it to *Briſtol.*—A prize was taken in the courſe of the voyage; and the captain ordered ſome of the crew to carry the prize to *Briſtol*, while he proceeded on his voyage: But the crew oppoſed him, and inſiſted on his going back, though he acquainted them with his orders; and he was forced to ſubmit, and on his return, his own ſhip was taken.—The underwriters inſiſted that this was a deviation which diſcharged them.—The plaintiff contended that it was *barratry.*—But Lord C. J. *Lee* was of opinion

A letter of marque having orders in caſe ſhe ſhould take a prize, to ſend it home, and proceed on her voyage; but the maſter being compelled by the ſailors, returns back with the prize: This is not barratry.

Elton v. *Brogden*, 2 *Str.* 1264. Sup. 413.

(*a*) Les aſſureurs ne répondent pas des méfaits des mariniers, à moins que par la police ils ne ſoient chargés de la *baratterie du patron.* Le mot *patron* comprehend ici tous ceux qui ſont aux gages du navire. *Emerig.* t. 1, p. 381, 2. Vid. *Valin*, t. 2, p. 3.

that

that it did not amount to barratry, as the ſhip was not run away with *in order to defraud the owners*: Neither was it a caſe of wilful deviation, but of deviation occaſioned by the force upon the maſter which he could not reſiſt, and therefore excuſed by the neceſſity. The inſurers were therefore held to be anſwerable, and the plaintiff had a verdict.

And yet if the captain cruiſe in queſt of prize, contrary to his orders, this is barratry, though done for the benefit of the owners as well as the crew.

The learned judge who tried this cauſe, and who was in general a maſter of all the learning of his time on the ſubject of inſurance, ſeems to have thought that nothing ſhort of running away with the ſhip, with intent to defraud the owners, amounted to barratry. What the ſeamen did in that caſe was but one degree ſhort of ſuch a crime. In the following caſe which we have already had occaſion to mention, the conduct of the maſter was held to be barratry, though certainly much more venial than that of the ſailors in the above caſe.

Moſs v. *Byrone*, 6 T. R. 379. Sup. 195.

A ſhip was chartered for a voyage from *Liverpool* to the *Bahamas* and back, and on her return from the *Weſt Indies*, letters of marque were taken on board, merely to entice ſeamen to enter, but without the neceſſary documents to give them validity, *and without any intention of cruiſing in queſt of prizes*; and it was a part of his written inſtructions, before he ſailed, to proceed to *Liverpool* with all expedition. A few days after the ſhip ſailed, however, the captain, with the concurrence of the majority of the ſeamen, determined to cruiſe for prizes; and he ſoon fell in with an *American* whom he plundered and afterwards diſcharged. He then cruiſed for ſome days out of the courſe of the voyage, and captured a ſhip of the enemy which he ſent to *Bermudas*, where he followed her himſelf, and there libelled her as prize in the court of admiralty, in the name of himſelf and *his owners*. But during his ſtay there his ſhip was ſtranded, and the cargo loſt. He directed that the cruiſing ſhould not be mentioned in the log-book. In an action to recover as for a loſs by barratry, it was contended on the part of the underwriters, that this could not be barratry, in as much as the act of the captain, however reprehenſible in other

reſpects,

reſpects, was done with a view to benefit, not to prejudice, his owners. But the court held this to be barratry; and that the ſtopping and plundering the *American* ſhip was of itſelf an act of barratry in the maſter, independent of his taking the prize, this being contrary to his duty to his owners, and to their prejudice; becauſe, by the charter-party, they had ſtipulated that the ſhip ſhould ſail directly to *Liverpool*, and they were therefore liable for any damage that might happen in conſequence of any wilful deviation. And though the captain might conceive that what he did was for the benefit of the owners; yet, if he acted contrary to his duty to them, it was barratry.

Though the captain conceive that what he does is for the benefit of the owners; yet, if it be contrary to his duty to them, it is barratry.

Barratry can only be committed by the maſter and mariners, by ſome act contrary to their duty, in the relation in which they ſtand to the owners of the ſhip. It is therefore an offence againſt them, and conſequently an owner himſelf cannot commit barratry. He may, by his fraudulent conduct, make himſelf liable to the owner of the goods on board, but not *for barratry*. Neither can barratry be committed againſt the owner, *with his conſent*; for though he may be liable for any loſs or damage occaſioned by the miſconduct of the maſter, to which he conſents, yet this is not barratry. Nothing is more clear than that a man can never ſet up as a crime an act done by his own direction or conſent. Theſe points will be found fully eſtabliſhed in the two following caſes.

Barratry can only be committed againſt the *owners of the ſhip*, and therefore it cannot be committed *with their conſent*.

In the firſt of theſe caſes it appeared that a ſhip was advertized to go to *Marſeilles*, goods were ſhipped on board her, and the maſter ſigned a bill of lading, whereby he undertook to go ſtreight to that place, and the goods were inſured, "from *Falmouth*, (where they were to be taken in), to *Marſeilles*." Before the ſhip departed from the port of *London*, another advertiſement was publiſhed for goods to *Genoa*, *Leghorn*, and *Naples*, and the plaintiff's agent was told that it was intended to go to thoſe ports firſt, and then come back to *Marſeilles*; but he inſiſted that his bargain was to go directly to *Marſeilles*, and he would not conſent to let her paſs by *Marſeilles* or alter his inſurance.—The ſhip, however, did paſs by *Marſeilles*; and after delivering her cargo at the other

A ſhip is engaged to carry goods ſtraight to *Marſeilles*; but inſtead of going thither direct, ſhe goes firſt to *Genoa* and *Leghorn*: This being done by the authority of the owner, and for his benefit, and no fraud being intended; it is not barratry.

Stamma v. *Brown*, 2 *Str.* 1173.

ports, ſet out on her return for *Marſeilles* with the plaintiff's goods; but, in her voyage thither, was blown up in an engagement with a *Spaniſh* ſhip of war. The plaintiff declared as for a loſs by the barratry of the maſter.—Lord C. J. *Lee* told the jury that this voyage, being againſt the expreſs agreement to proceed ſtraight to *Marſeilles*, ſeemed to be more than a common deviation, as it was a formed deſign to deceive the plaintiff; and compared it to the caſe of ſailing out of port without paying the duties, whereby the ſhip was ſubjected to forfeiture, which had been holden to be barratry.—The jury, after ſtaying out ſome time, returned and aſked the Chief Juſtice, whether, if the maſter was to have no benefit to himſelf by paſſing by *Marſeilles*, and went only to the other places firſt, for the benefit of his owners, that would be barratry; and the chief Juſtiee anſwering, No, they found for the defendant.—On a motion for a new trial, the court, after argument, were unanimouſly of opinion that the verdict was right: For the maſter had acted conſiſtently with his duty to his owners, and the plaintiff's agent knew of the intended alteration, before the goods were put on board, and might have refuſed to ſhip them, or have altered the inſurance: That to make it barratry there muſt be ſomething of a criminal nature, as well as a breach of the contract; and that here, the breach being aſſigned only on the *barratry*, was not ſupported by the evidence.

After bills of lading are ſigned by the captain, and delivered to the owner of goods, the captain, at the inſtance of the owner, ſigns new bills of lading, changing the deſtination of the ſhip; and by this contrivance the goods are diſpoſed of for the uſe of the owner of the ſhip, and in fraud of the owner of the goods. This being done with the concurrence

The other was the caſe of an inſurance effected on behalf of *Hague*, before he became bankrupt, on goods on board the *Rachette* from *London* to *Rochelle*. In an action on this policy it appeared that the maſter, *by the inſtigation and direction of* Le Grand, *the owner of the ſhip, went with the ſhip and cargo to* Bourdeaux, *inſtead of* Rochelle, *where the cargo was ſold by the agent of* Le Grand: That a petition was preſented by the inſured to the admiralty of *Guienne*, ſtating that *Le Grand*, partner in a houſe at *Rochelle*, being in *London* with his ſhip, and in want of a cargo to return home, applied to *Hague*, who agreed to ſupply him with goods, which were loaded on board the ſhip, for account of *Le Grand*: That as *Hague* did not know the houſe of *Le Grand*, it was agreed between

tween him, *Le Grand*, and the captain, that the bills of lading ſhould not be delivered to *Le Grand* but at *Rochelle*, after he ſhould have paid the amount to the agent of *Hague*, in good bills, and, in default, that the goods ſhould be received by *Hague*'s agent for his account, free from freight, &c.: That the captain accordingly delivered bills of lading to *Hague*, who forwarded them, together with the contract, to his agent at *Rochelle*, with orders to receive the goods on the arrival of the ſhip, or deliver them to *Le Grand* if he ſhould fulfil his agreement. That, upon the ſhip's arrival at the harbour of *Rochelle*, *Le Grand* went on ſhore, got ſecretly into the town, where, having conſulted with his partners how to elude the precautions taken by *Hague*, returned on board, and got the captain fraudulently to ſign other bills of lading, by which he reſerved to himſelf the liberty of putting into *Rochelle* or *Bourdeaux*; and by means of the falſe bills of lading, and by the contrivance of *Le Grand*, the goods were there put into the hands of *Le Grand*'s agent. That *Hague*'s agent on hearing of this, applied to the houſe of *Le Grand*, who gave him bills for the whole amount, but which were afterwards diſhonoured; and thereupon the agent attached the cargo in the hands of the ſeveral perſons who held it: That the houſe of *Le Grand* having delivered a falſe account to their creditors, a releaſe was granted them from all attachments and executions, confirmed by the Parliament of *Paris*, with an injunction to all perſons arreſting their goods to reſtore them: That, in conſequence of this petition, the court of admiralty at *Bourdeaux* decreed *that the captain was guilty of barratry*, for having ſigned falſe bills of lading, in order to change the voyage, and carry away the goods; for which they condemned him to the galleys for life. They alſo declared *Le Grand* to be an *accomplice in the ſaid barratry of the maſter*, and guilty of robbery in cauſing the ſhip to be brought into *Bourdeaux*, and condemned him to the gallies for five years: That they likewiſe condemned the captain and *Le Grand* to pay the value of the goods, with the chatges, &c.—Upon this caſe it was contended on the part of the plaintiff, that the fraudulent conduct of the

of the owner, is not barratry.

Nutt and others, aſſignees of *Hague* v. *Bourdieu*, 1 T. R. 323.

captain amounted to barratry.—But the court were clearly of opinion that this could not be barratry, and that the plaintiff ought not to recover.—Lord *Mansfield* ſaid,—"The ſentence of the *French* court of admiralty, which declared the maſter and owners to have been guilty of barratry, is entirely out of the queſtion: For, though it was a moſt righteous judgment, yet it was no part of the conſideration of that court, what was meant by barratry in an *Engliſh* policy. Their idea of barratry was manifeſtly different from the conſtruction put upon that word in our own courts; for they had found the *owner* guilty of barratry, which was entirely repugnant to every definition of barratry which had ever been laid down in an *Engliſh* court of juſtice:—The point to be conſidered is, whether barratry, in the ſenſe in which it is uſed in our policies, can be committed againſt any but the owners of the ſhip. It is clear beyond contradiction that it could not; for barratry is ſomething contrary to the duty of the *maſter* and *mariners*, the very terms of which imply that it muſt be in the relation in which they ſtand to the *owners of the ſhip*. An owner, therefore, cannot commit barratry. He may make himſelf liable by his fraudulent conduct to the owner of the goods, but not as for barratry. And, beſides, barratry can not be committed againſt the owner *with his conſent:* For though the owner may become liable for a civil loſs, by the miſbehaviour of the captain, if he conſented, yet that is not barratry. Barratry muſt partake of ſomething criminal, and muſt be committed *againſt the owner*, by the maſter or mariners."

If the ſame perſon be both owner and maſter, he cannot commit barratry.

If the maſter of the ſhip be alſo the owner, he cannot commit barratry, becauſe he cannot commit a fraud againſt himſelf. And even where he has mortgaged the ſhip, and the legal title is in another, and he has only the equity of redemption, yet he is ſtill ſo far the owner that he cannot commit barratry.

The owner mortgages the ſhip, and acts as maſter while he is poſſeſſed of the equity of redemption: He cannot commit

Thus:—An inſurance was made on a voyage "from "*London* to *Marſeilles*, and from thence to ſome port in "*Holland*."—The ſhip ſailed to *Marſeilles*, and there the maſter, inſtead of purſuing his voyage to *Holland*, ſailed

to

to the *Weſt Indies*, where he ſold the ſhip, and died inſolvent.—An action at law being brought by the inſured for a loſs occaſioned by the *barratry of the maſter*, the underwriter brought his bill in Chancery for an injunction to ſtay the proceedings at law; ſuggeſting that *the maſter was alſo the owner of the ſhip*; that he had, before the voyage, entered into a bottomry bond to the defendant for 200 l.; and though he had afterwards, by a bill of ſale, aſſigned over his intereſt in the ſhip to the defendant as a ſecurity for the 200 l., yet, it was inſiſted that, in equity, the captain was ſtill to be conſidered as the owner of the ſhip, though in a court of law, the legal title would be looked upon to be in the defendant; and that the owner of the ſhip could not, either in law or equity, be guilty of barratry. The matters of fact being admitted, an injunction was moved for, on the principle that a mortgagor is to be conſidered in equity as the owner of the thing mortgaged, and that the maſter being owner, could not be guilty of barratry. Lord *Hardwicke* C. granted the injunction.—He ſaid,—"Barratry is an act of wrong done by the maſter againſt the ſhip and goods; and this being the caſe of a ſhip, the queſtion will be, Who is to be conſidered as the owner? Several caſes might be put where barratry may be aſſigned as the breach of an inſurance; and barratry or not, is a queſtion properly determinable at law: But in this caſe it is not ſo; for courts of law will not conſider a mortgagor as having any right or intereſt in the thing mortgaged; and a man may frequently come into equity for relief in reſpect of a part only of his caſe. It might, indeed, be conſidered at law, whether, what the maſter has done, whether he be owner or not, did not amount to a breach of the contract as maſter, and ſo to a barratry: It may likewiſe be ſo conſidered in this court. But at law a defendant cannot read part of a plaintiff's anſwer to a bill filed againſt him here: The whole anſwer muſt be read, which has often been a reaſon for this court to interpoſe by injunction upon a plaint at law; and conſidering the mixed nature of this caſe I think an injunction ought to be granted."

barratry being ſtill conſidered as owner.

Lewin v. *Sunſo*, *Pyſ.* Dict. vol. 1, p. 147.

But a general freighter is conſidered as owner for the voyage; and a deviation without his knowledge, though with the conſent of the original owners, is barratry.

Vallejo v. *Wheeler*, *Cowp.* 143.

Yet, where a ſhip is let out to freight generally, the freighter is conſidered as the owner for that voyage; and a deviation for an illegal purpoſe, without the knowledge or conſent of the freighter, will be barratry, though it be with the conſent of the original owner. This will appear from the following caſe.

An inſurance was made in the common form on goods, "From *London* to *Seville*, with liberty to touch at any "ports or places, &c."—In an action on the policy, the loſs was alledged different ways in the declaration; *firſt*, that the ſhip, by ſtorms and perils of the ſea, was forced to go to *Dartmouth* to be repaired; and that afterwards a further loſs happened by ſtorms, &c.: *ſecondly*, that it happened by ſtorms, &c. in the voyage generally; and *thirdly*, by the *barratry of the maſter*.—At the trial it appeared, that the ſhip was put up as a general ſhip from *London* to *Seville*, and was let to freight by one *Willes* to *Darwin* (*a*). That it is the courſe for veſſels going on the voyage, to ſtop at ſome port in the weſt of *Cornwall*, to take in proviſions. That this ſhip having taken her cargo on board, ſailed from *London* to the *Downs*, and while ſhe lay there, all the other ſhips bound to the weſtward bore away; but ſhe ſtaid till the night after, and then ſailed to *Guernſey*, which was out of the courſe of the voyage: That the captain went there for his own convenience, to take in brandy and wine on his own account, after which he intended to proceed to *Cornwall*. That the night after ſhe quitted *Guernſey* ſhe ſprung a leak, which obliged her to put into *Dartmouth*. When ſhe was refitted ſhe ſailed again, and proceeded for *Helford* in *Cornwall*, where it was always intended ſhe ſhould ſtop and take in proviſions; but in her way, ſhe received further damage, and at her arrival was totally incapable

(*a*) Mr. *Cowper's* report of this caſe ſtates *Darwin* to have chartered the ſhip to *Brown* the captain. Mr. Juſtice *Buller* in 1 T. R. 330, ſays that the error ſhould be corrected by ſtating that the ſhip was chartered by *Brown* to *Darwin*, and not by *Darwin* to *Brown*. But it appears by the ſubſequent part of the report that *Darwin* freighted the ſhip from *Willes*.

of

of proceeding on the voyage, and the goods insured were much damaged.—It was attempted, on the part of the defendant, to prove that the voyage to *Guernsey* was on account of *Willes*, the owner of the ship, and that the goods taken on board there were his property: But this evidence went little further than information and belief, except that when the ship arrived at *Helford* the wine was delivered into his cellar.—Mr. Justice *Ashurst*, who tried the cause, told the jury that if the going to *Guernsey* was without the knowledge of *Darwin*, it was barratry; and they ought to find for the plaintiff: But if done with his knowledge, then it was not barratry: And if they should be of opinion that it was without the knowledge of *Darwin*, then, he desired them to say whether they thought it was with the knowledge of *Willes* or not (*a*). The jury found for the plaintiff, and said they thought the going to *Guernsey* was without the knowledge of *Darwin*, whom they looked upon to be the owner, but they thought it was with the knowledge of *Willes*.—Upon a motion for a new trial, two questions were made: *First*, Whether the conduct of the master, in going to *Guernsey*, for the purpose, and under the circumstances, above stated, was barratry: Supposing this to be barratry, then *secondly*; whether, to entitle the plaintiff to recover, the loss must not have happened during the time of the barratry, or have been occasioned immediately by the act of barratry: Here the goods were not seized for smuggling, nor did the loss happen till after the act of barratry.—The court, after two arguments, were unanimously of opinion that this was barratry.—They said that if a ship be let out generally to freight, the freighter is owner for that voyage; but if there be only a covenant to carry goods, the

(*a*) There seems to be some error in this part of the report. The first part of the direction of the learned judge *takes it for granted* that *Darwin* was the owner. If so, it could not be material to enquire whether the deviation was with, or without, the knowledge of *Willes*. It would seem from the finding of the jury, that it had been left to them to say which of the two was the owner.

owner of the ſhip would have the direction of her, and the hiring of the maſter and mariners. That though *Willes* was originally the owner, and not being the inſured here, every thing relating to him might be laid out of the caſe, and that the jury, therefore, did right in conſidering *Darwin* as owner *pro hac vice*: That *Darwin* being the freighter, and owner of the goods on board, any fraud committed on the owner, muſt be committed on him: That the maſter had agreed to go on a voyage from *London* to *Seville*; *Darwin* truſted he would ſet out immediately; inſtead of which he went on an iniquitous ſcheme, totally diſtinct from the purpoſe of the voyage to *Seville*; that this was a cheat and a fraud on *Darwin*, and was therefore barratry; which is not confined to the running away with the ſhip, but comprehends every ſpecies of fraud, knavery, or criminal conduct in the maſter, by which the owners or *freighters* are injured; and whether the loſs happened in the act of barratry; that is, *during* the fraudulent voyage, or after, was immaterial; becauſe the voyage was equally altered, even though there was no other iniquitous intent. But, independently of this, the judges ſeemed to think that the loſs, in the preſent caſe, was ſuſtained *in conſequence* of the alteration in the voyage. The moment the ſhip was carried from her right courſe, it was barratry, and the loſs happened in conſequence. But ſuppoſing the loſs to have happened *afterwards*, the inſured, if not protected againſt the barratry of the maſter, would have loſt his inſurance by the fraud of the maſter; for it was clearly a deviation, and he could have no remedy againſt the underwriters for a loſs in conſequence of a deviation.

Though barratry muſt be ſtrictly proved; yet proof that the maſter committed barratry is *primâ facie* ſufficient, without ſhewing *negatively*, that he was not owner, &c.

Though it is a maxim in law that fraud ſhall never be preſumed, but muſt be ſtrictly proved; and it is a rule in queſtions of inſurance, that he who charges barratry muſt ſubſtantiate it by concluſive evidence (a); yet in the

(a) Barataríæ crimen nunquam eſt præſumendum, ſed concludentiſſimè probandum. *Caſaregis*, diſc. 1, n. 60; diſc. 225, n. 99; diſc. 226, n. 6. Vid. *Emerig.* tom. 1, p. 372.

following

following case it was determined that proof of the master's having carried the ship out of the regular course of the voyage for fraudulent purposes of his own, is *prima facie*, sufficient to entitle the plaintiff to recover; without shewing negatively that he was not the owner, or that any other person was the owner, or that this was not done with the owner's consent.

Goods were insured on board the *Live Oak*, *Joseph Rati* master, "at and from *Jamaica* to *New Orleans*."—In an action on the policy, there were two counts in the declaration, the first alledging a loss by the barratry of the master; the second by the perils of the sea.—Upon the trial, it appeared that the ship was put up as a general ship at *Jamaica*, that she sailed on the voyage insured in *May* 1793. That the plaintiff, amongst others, shipped the goods in question, and in *June* following, arrived in the mouth of the *Mississippi*, which leads up to *New Orleans in Spanish America*, at the distance of 35 leagues. When the captain had got thus far, he dropped anchor, and went in his boat up the river to *New Orleans*, and, on his return, without carrying the ship to her port of destination, stood away for the *Havannah*, after which he was never heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reason for supposing he intended to dispose of at *New Orleans*; but finding it difficult to do so on account of an interdiction by the *Spanish* government against the importation of them there, he went to the *Havannah* in quest of a market for them. The defendants, without offering any evidence, insisted that, upon the plaintiff's own shewing, he could not recover. Upon the first count, there was no evidence to shew that the captain was guilty of barratry; for *non constat* that he was not himself the owner or *general freighter* of the ship; or if not, that he had acted contrary to the directions of the owner in going out of the original course. And as to the second count, there was a clear deviation which discharged the underwriters.—Lord *Kenyon* who tried the cause, was of opinion that barratry was sufficiently proved, and that therefore the plaintiff was intitled to recover on the first count, and

Goods are insured from *Jamaica* to *New Orleans*, and the master anchors in the mouth of the *Mississippi*, goes up to that place in his boat for a fraudulent purpose, and on his return, stands away for the *Havannah*: Proof of these facts is sufficient evidence of barratry, without shewing negatively that the master was not *owner* or *general freighter*.

Ross v. *Hunter*, 4 T. R. 33.

and the jury found accordingly.—Upon a motion for a new trial, the court were clearly of opinion that the evidence was ſufficient to ſupport the verdict. The ſhip was a general ſhip, of which *Rati* was proved to be *captain*, which is *primâ facie* evidence that he was not *owner*. There was no proof of his being owner; and if that fact were neceſſary to conſtitute the defence of the underwriter, the affirmative proof lay upon him. For the ſame reaſon, if *Rati* had been general freighter, that ought to have been proved by the defendant.—Mr. Juſtice *Buller* alſo held, that the very dropping of the anchor in the mouth of the *Miſſiſſipi*, being with a fraudulent view, was an act of barratry.

Even dropping anchor with a fraudulent view, is an act of barratry.

If a ſhip be inſured for a term, *in any lawful trade*, and barratry be one of the riſks mentioned in the policy, the underwriters are anſwerable for barratry of the maſter by ſmuggling; for *lawful trade* in the policy means the trade in which the ſhip ſhall be employed by the owners, and not any unlawful commerce in which the captain may be engaged without their concurrence.

Though the words "*in any lawful trade*" be inſerted in the policy, ſtill the inſurer is liable, if the captain commit barratry by *ſmuggling on his own account*.

As, where a ſhip was inſured for twelve months, *in any lawful trade*, to commence on her ſailing from *Sunderland*; and *barratry of the maſter and mariners* was one of the perils ſet forth in the policy.—The declaration alledged, that the ſhip ſailed *in a lawful trade* from *Sunderland*, and afterwards ſailed on a voyage from *Oſtend* to *Sunderland*, but put into the port of *Shields*, where the maſter, *in a barratrous and fraudulent manner, without the knowledge or conſent of the owner*, did fraudulently and barratrouſly, import from *Oſtend*, a quantity of ſmuggled goods, whereby the ſhip became forfeited, and was ſeized.—To this the defendant demurred, and inſiſted that, as the inſurance only extended to loſſes which the ſhip might ſuſtain in a *lawful trade*; the underwriter could not be liable for any loſs occaſioned by an *unlawful trade*, whether it proceeded from the act of the maſter or owner; and that the barratry inſured againſt was ſuch as might happen in a lawful trade, as by deſerting, ſinking, or running away with, the ſhip.—But the court determined that if the owner conducted himſelf

Blankley v. *Winſtanley*, 3 T. R. 279.

with

with propriety, he was entitled to be indemnified againſt all the perils inſured againſt in the policy; and that the words "*any lawful trade*" in the policy, meant the trade in which the ſhip was employed *by the owners*.

The inſurer will not be liable unleſs the loſs happen during the voyage, though the barratry was committed before the voyage ended.

Every loſs muſt appear to be a direct and immediate conſequence of the cauſe to which it is aſcribed by the inſured. We have ſeen, however, in the caſe of *Vallejo* v. *Wheeler* (*a*), that whether the loſs happen during the act of barratry, or after it, is immaterial. Yet, the following caſe will ſhew, that, if a loſs do not happen within the time preſcribed by the policy for the duration of the riſk, the inſurer will not be liable for it, though it be the undoubted conſequence of the act of barratry.

Lockyer v. *Offley*, 1 T. R. 252; Sup. 174.

A ſhip was inſured from *Hamburgh* to *London*; and it appeared that, in the courſe of the voyage, the maſter committed barratry, by ſmuggling on his own account, on the *Engliſh* coaſt; that on the 1ſt of *September* 1785 the ſhip arrived at her moorings in the *Thames*, where ſhe remained in ſafety till the 27th, when ſhe was ſeized for the ſmuggling above ſtated, and the owners, upon their petition, had leave to compound for a ſum of money.—Upon this caſe it was determined that though, by the exciſe laws, the forfeiture attaches the moment the offence is committed, and the ſhip may be ſeized at any time afterwards, and that the barratry was committed *during the voyage*; yet, that the underwriters were not liable for this loſs; for the law of inſurance would be left unſettled, if the liability of the inſurers were to be continued for any other time than that preſcribed by the policy.

How barratry ſhall be puniſhed

The offence of barratry ſo miſchievous in itſelf, and ſo injurious to commerce, is puniſhable as a public offence, according to the degree of guilt of the offender, by every commercial ſtate in *Europe*.

in *France*.

In *France*, any fraud practiſed by the maſter or mariners, with or without the privity of the owners, and frauds committed by the owners themſelves, are, as we have already ſeen, accounted barratry, and are puniſhed with exemplary ſeverity. It appears by the caſe of *Nutt*

(*a*) Sup. 454.

v. *Bour-*

v. *Bourdieu* (*a*), that the captain of a ſhip was ſentenced to the gallies for life for ſigning falſe bills of lading, in order to change the voyage and carry away the goods: And the owner, who was convicted of being an accomplice in this crime, and of robbery in cauſing the ſhip to be carried to a wrong port, and converting the goods on board to his own uſe, was ſentenced to the gallies for five years.

How offences of this nature are puniſhed by the laws of this country, will be ſhewn by the laſt ſection of the preſent chapter.

Sect. 7.

Of Loſs by average Contributions.

THE ſubject of average is a branch of marine law which does not properly make a part of the law of marine inſurances. But as inſurers, by the general words of moſt policies, are liable to indemnify the inſured againſt thoſe contributions which are denominated *general average*, the ſubject of average muſt often incidentally occur in the conſideration of partial loſſes; it will therefore be neceſſary, in this place, to take a curſory view of this ſubject, and of the regulations by which averages are generally underſtood to be governed.

Average what.

Average (*b*) is a term uſed in commerce to ſignify a contribution made by the owners of the ſhip, freight, and goods on board, in proportion to their reſpective intereſts, towards any particular loſs or expence ſuſtained for the general ſafety of the ſhip and cargo; ſo as that the particular loſer may not be a greater ſufferer than the owners of the ſhip and the other owners of goods on board. Thus, where the goods of a particular merchant are thrown overboard in a ſtorm to ſave the ſhip from ſinking, which

In what caſes average contributions become payable.

(*a*) 1 T. R. 325, ſup. 450.—(*b*) Average is derived from the latin word *averagium*, which comes from the verb *averare* to carry, and originally ſignified a ſervice which the tenant owed to his lord, by horſe or carriage. It is ſaid to have been introduced into commerce to ſhew the proportion and allotment to be paid by every man according to his goods *carried*. *Cowel.*

may

may be lawfully done (*a*); or where the masts, cables, anchors, or other furniture of the ship are cut away or destroyed, for the preservation of the whole (*b*); or money or goods are given as a composition to pirates to save the rest; or damage is sustained in defending the ship against an enemy or pirate; or a ransom, (when that is legal), is agreed to be paid to an enemy or pirate for liberating the ship; or an expence is incurred for physic and attendance in curing the officers or seamen wounded in defence of the ship; or in reclaiming the ship, or defending a suit in a foreign court of admiralty, and obtaining her discharge from an unjust capture or detention. In these, and the like cases, where any loss is sustained, or any expence fairly and *bonâ fide* incurred, to prevent a total loss, such loss is the proper subject of a general contribution, and ought to be rateably borne by the owners of the ship, freight, and cargo on board, so that the loss may fall equally on all. This just and equitable contribution is called general or gross average, the regulations of which are found in almost every system of marine law (*c*). *Omnium contributione sarciatur, quod pro omnibus datum est.—Æquissimum enim est, commune detrimentum fieri eorum qui propter amissas res aliorum, consecuti sunt ut merces suas salvas habuerunt* (*d*).

This is the original and proper meaning of average. When understood in this sense, it is called *general*, or *gross* average, because it falls generally upon the whole or

General average.

(*a*) 12 Co. 63, *Mouse*'s case.—(*b*) Si arbor vel aliud navis instrumentum, removendi communis periculi causa dejectum est, contributio debetur. ff. Leg. Rhod. L. 3. de jact. Vid. *Molloy*, b. 2, c. 2, § 6. But if the loss of the masts, anchors, sails, &c. be occasioned by mere stress of weather, this is not a general average, but the loss falls on the owner. *Le Guidon*, ch. 5, art. 20.—(*c*) Vid. Mo. 297. *Show.* Ca. parl. 19. Brownlex mere. 148, 1 *Mag.* 64, 2 *Mag.* 96, 183, *Molloy*, b. 2, c. 2, 5, 6, 12, ff. Leg. *Rhod.* art. 9. Laws of Wisb. art. 20. Laws of Ol. art 8. See also the ordinances of the different commercial states, as collected by *Magens*.—(*d*) ff. Leg. *Rhod.* L. 1. de jact.

gross

groſs amount of the ſhip, freight, and cargo, and alſo to diſtinguiſh it from what is often, though improperly termed *particular average*, but which, in truth, means a particular, and not a general loſs, and has no affinity to average properly ſo called.

Particular average.

Petty average.

Beſide theſe, there are other ſmall charges called *petty* or *accuſtomed* averages. Such as pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, river-charges, ſignals, inſtructions, caſtle-money, pier-money, digging the ſhip out of the ice, &c. When theſe petty charges are incurred in the uſual courſe of the voyage, they are not conſidered as a *loſs* within the meaning of the policy, but only *a neceſſary and ordinary expence*: But if incurred for any extraordinary purpoſe in the voyage, as to provide againſt any impending danger, or in conſequence of the ſhip's being driven out of her courſe by ſtreſs of weather; they will then be deemed groſs or general average, for which the inſurer will be liable (*a*).

Such petty averages as are the uſual charges of the voyage are not a charge on the inſurers.

Otherwiſe if they have been occaſioned by ſtreſs of weather, &c.

A contribution upon a general average can only be claimed in caſes where, upon as much deliberation and conſultation between the captain and officers as the occaſion will admit of, it appears that the ſacrifice, at the time it was made, was abſolutely and indiſpenſably neceſſary for the preſervation of the ſhip and cargo. Some have even gone farther, and have ſaid, that the ſaving of the ſhip and cargo muſt *appear* to have been in fact owing to ſuch ſacrifice (*b*). But this, beſides being in moſt caſes incapable of proof, is quite unreaſonable and unjuſt.

Average contributions can only be claimed where the ſacrifice was abſolutely neceſſary.

A loſs which does not evidently conduce to the preſervation of the ſhip and cargo, is not a proper ground for an average contribution: As if a pirate, having made himſelf maſter of a ſhip and cargo, take only the goods of a particular perſon (*c*); or if ſome particular goods be

And where it appears to have conduced to the preſervation of the ſhip.

(*a*) Vid. 1 *Mag.* 72. 2 *Mag.* 278.—(*b*) *Beawes* 148.—(*c*) *Mal.* lex merc, 109.

damaged

damaged in a ſtorm; in ſuch caſes the reſt ſhall not be contributory (*a*). So, if upon the apprehenſion of an enemy, ſome goods are landed and ſecured on ſhore, and the reſt taken; the owner of the goods taken ſhall not have average of the goods ſaved; for the ſalvage of theſe is not the cauſe of the taking of the reſt; neither was the taking of thoſe the cauſe of the ſalvage of the goods ſaved (*b*).

And where the ſhip and the reſt of the cargo were in fact ſaved.

So, it muſt appear that the ſhip and the reſt of the cargo were in fact ſaved: For if goods be thrown overboard in a ſtorm, and the ſhip afterwards periſh in the ſame ſtorm there ſhall be no contribution of the goods ſaved, if any; becauſe the object for which the goods were thrown overboard was not attained. But if the ſhip be preſerved by the *jettiſon*, or throwing goods overboard, and continue her courſe, but is afterwards loſt; the effects ſaved from this laſt misfortune, if any, ſhall contribute to the loſs ſuſtained by the jettiſon; becauſe to that their preſervation was once owing (*c*).

If goods, put into lighters to enable a ſhip to get up a river, be loſt, the reſt ſhall contribute: But if the ſhip be loſt, the goods in the lighters ſhall not contribute.

Upon the ſame principle, if a ſhip, upon her arrival at the mouth of a river or harbour, be found too deeply laden to get over a bar, or to ſail up, and the captain, to lighten her, put part of the cargo into lighters, and theſe lighters are loſt; the owners of the ſhip and the remaining goods ſhall contribute to this loſs; becauſe the removal of part of the cargo from the ſhip into the lighters was for the general benefit. But ſhould the ſhip be loſt, and the lighters be ſaved; the owners of the goods preſerved in the lighters ſhall not contribute to this loſs, becauſe the ſhip could not be ſaid to have been loſt for the preſervation of the goods in the lighters, and becauſe it is a general rule that a contribution is only due when the ſhip and the remaining cargo come ſafe to port (*d*).

(*a*) R. *Mo.* 297.—(*b*) R. *Show.* Ca. Parl. 20.—(*c*) 2 *Mag.* 98, 240. Ord. *Louis* XIV. tit. contrib. art. 15, 16. Semb. cont. 1 *Mag.* 56. Vid. *Show.* Ca. Parl. 20. *Mo.* 297.—(*d*) Vid. 1 *Mag.* 56. *Malyne*, 109, 110.

Whether the wages and expences of the crew during the detention of a ſhip unjuſtly captured be a general average.

If a ſhip be unjuſtly captured and carried into a foreign port, it is ſaid that, not only the charge of reclaiming her, but alſo the wages and expences of the ſhip's company during the detention, ſhall be brought into a general average (*a*).

Whether ſuch charges, where a ſhip is forced to go into port to refit after a ſtorm, be a general average.

It is alſo ſaid, that where a ſhip is forced to enter a port to repair the damage ſhe has ſuffered in a ſtorm, being unable to continue her voyage without apparent riſk of being loſt; that, in ſuch caſe, the wages and proviſions for the crew, from the day it was reſolved to ſeek a port to refit the veſſel, to the day of her departure from thence, with all the charges of unloading, reloading, anchorage, pilotage, and every other expence incurred by this neceſſity, ſhall be brought into a general average (*b*).

Though this point has never yet been expreſsly decided in any *Engliſh* court of juſtice, yet the principle ſeems to have been acceded to at different times by judges of great authority.

Upon a policy on the ſhip, wages while the ſhip was under a repair, not occaſioned by any extraordinary accident, cannot be recovered.

Thus, where an action was brought upon a policy on a ſhip, to recover the amount of wages and proviſions expended during the time ſhe went from *Bengal* to *Bombay* to repair;—Lord *Mansfield*, as he frequently did afterwards on ſimilar occaſions, decided that, as the inſurance was on the *ſhip* only, and the claim was for *wages*, the action could not be maintained. But he ſaid, that there might be caſes where exceptions to the general rule ought to be allowed; but that, in order to conſider a caſe as *excepted*, it muſt appear that the expence was abſolutely neceſſary, and occaſioned by ſome of the perils mentioned in the policy.

Leteward v. *Curling*, at N. P. after Trin. 1776. *Park* 125.

But there may be exceptions to this rule.

If a ſhip be obliged to put into port to repair, the charges of unloading and re-loading the cargo, and the expences of the repair are a general average.

In the caſe of *Da Coſta* v. *Newnham* (*c*), Mr. Juſtice *Buller* cites the above paſſage from *Beawes*, and though it was not neceſſary, he ſaid, to determine that point then, he ſeemed diſpoſed to concur in it. It was, however, determined in that caſe, that where a ſhip is obliged

(*a*) *Beawes*, 150, 1 *Mag.* 67. Vid. Ord. of *Louis* XIV, tit *avaries*, art. 7.—(*b*) *Beawes* 150.—(*c*) 2 T. R. 407, poſt.

to

to put into port to repair, and this is neceſſary for the ſafety of the whole concern, the charges of unloading, re-loading, and taking care of the cargo, and alſo the wages and proviſions of the workmen hired for the repair, become a general average. This deciſion comes very near, in principle, to the doctrine in *Beawes*: The only difference conſiſts in this, that *Beawes* allows the wages and proviſions of the ſeamen, during the interruption, to be brought into a general average: But in *Da Coſta* v. *Newnham*, the crew were diſcharged at the place where the ſhip was repaired; and therefore it was not neceſſary to decide that point.

Every injury occaſioned by mere ſea-damage is only a particular average.

No injury occaſioned by mere ſea-damage can be the proper ſubject of general average. As if the ſhip be damaged in her hull or in her rigging, the goods on board ſhall not contribute for this. For the ſhip is like any inſtrument uſed by a workman in his trade. If, in doing his work, he breaks his hammer or his anvil, he can claim no ſatisfaction for this from his employer. '*Si conſervatis mercibus, deterior facta ſit navis, aut quid exarmaverit, nulla facienda eſt collatio: Quia diſſimilis earum rerum cauſa ſit, quæ navis gratia parentur, et earum pro quibus mercedem aliquis acceperit. Nam et ſi faber incudem aut maleum freſerit; non imputaretur ei qui locaverit opus. Sed ſi voluntate vectorum, vel propter aliquem metum, id detrimentum factum ſit; hoc ipſum ſarciri oportet* (*a*)'.

Upon the ſame principle if a ſhip ſpring a leak in a ſtorm, by which goods on board are ſpoiled; this is a ſimple or particular average, or particular loſs, and not the ſubject of an average contribution (*b*).

The owners of the ſhip may maintain an action againſt the owner of corn on board, to recover a contribution for ſacrifices of the ſhip's tackle, and expences incurred, to ſave the corn.

But in a late caſe, where the captain cut the ſhip's cable and made other ſacrifices of the ſhip's tackle and furniture, to prevent her from being caſt away in a ſtorm; and alſo employed and paid a number of men to keep the ſhip, which had been damaged in the ſtorm, free from water, in order that a cargo of corn which was then on board might

(*a*) Dig. l. 14, tit. 2, de leg. *Rhod.* de jact. § 1.—(*b*) *Conſolato del mare*, ch. 63, vid. alſo ch. 193, 194. *Le Guidon*, ch. 5, art. 20. Laws of *Wiſbuy*, art. 12. *Roccus* de navib. N. 59.

Birkley and others v. *Preſgrave*, 1 *Eaſt* 220.

not be damaged; it was determined that this was a general average, and that the owner of the ſhip might maintain an action at law againſt the owner of the corn, to recover his contribution.

What things ſhall be liable to contribute to a general average.

As to the things on board which ſhall be liable to contribute to a general average, the rule ſeems to be,—that the ſhip, freight, and every thing remaining on board that can properly be deemed a part of the cargo, ſhall be ſubject to this charge; and therefore money, plate, and even jewels, though their *weight* could not have increaſed the danger of the ſhip, muſt contribute according to their value; becauſe the ſacrifice was as neceſſary for their preſervation, as for that of any thing elſe on board (*a*). But the perſons on board, their wearing apparel, the jewels or ornaments belonging to their perſons, ſhall not contribute (*b*). Neither are ſeamen's wages liable to contribute (*c*). If it were otherwiſe, ſeamen might ſometimes be tempted to reſiſt when a ſacrifice is neceſſary for the general ſafety.

What not.

It is the captain's duty, on his arrival in port, to ſettle the contribution.

If the ſhip eſcape the dangers which made the ſacrifice neceſſary, and arrive at her port of deſtination, the captain regularly ſhould make his proteſts; and he, with ſome of the crew (*d*), muſt ſwear that the goods were thrown overboard, money paid, or other loſs ſuſtained, for the ſafety of the ſhip and goods, and for the preſervation of the lives of thoſe on board, and for no other cauſe (*e*). The average, if not ſettled before, ſhould then be adjuſted, and it ſhould be paid before the cargo is landed; for the owners of the ſhip have a *lien* on the goods on board; not only for the freight, but alſo *to anſwer all averages and contributions* that may be due (*f*).

Remedy againſt the captain for neglecting to adjuſt the average, or to collect it.

Should this be neglected, the particular ſufferer is not without remedy. As it is the duty of the captain

(*a*) 1 *Mag.* 62, *Molloy*, tit. Aver. § 4. Per *Buller*, J. in *Peters* v. *Milligan*, at N. P. after M. 1787.—(*b*) Vid. *Molloy*, l. 2, c. 6, § 4, Leg. *Rhod.* § 2, art. 8. Leg. *Oler.* art. 8. Leg. *Wiſb.* art. 20. As to freight, vid. 2 T. R. 407.—(*c*) 1 *Mag.* 71.—(*d*) Mal. lex merc. 113, ſays, *with moſt part of his company.*—(*e*) *Beawes* 148. *Molloy*, l. 2, c. 6, § 2. *Mal.* L. M. 113.—(*f*) *Mal.* L. M. 113.

to detain the goods on board till the contribution be made, an action would, I conceive, lie againſt him, or againſt the owners, for a neglect of that duty. If the loſs was in money paid, an action on the caſe for money paid, would unqueſtionably lie againſt each perſon bound to contribute for his ſhare: If in goods, a ſpecial action on the caſe founded on the cuſtom of trade would lie againſt each perſon liable to contribute (*a*), or a bill in equity might be filed againſt them all.

How the amount of each perſon's ſhare of the contribution ſhall be ſettled.

The mode of aſcertaining the amount of each perſon's contribution, is not very accurately defined in our law. —It is uſually done, upon the ſhip's arrival at her port of diſcharge, by aſcertaining the neat value of the ſhip, freight, and cargo, as if nothing had been loſt, but all had arrived ſafe (*b*). Theſe are to be valued at the price they would fetch in ready money at the port of diſcharge; and the neat amount, after deducting all charges, is the ſum which is ſubject to the contribution (*c*). And each perſon's ſhare of the loſs will bear the ſame proportion to the value of his property, as the whole loſs bears to the aggregate value of the ſhip, freight, and cargo.

In what degree the ſhip ſhall be liable.

Different foreign ſtates have eſtabliſhed a variety of poſitive regulations, as to the *degree* in which the ſhip ſhall be liable to contribute. Some, as in *England*, make the ſhip contribute for her full value and the freight (*d*); others, for half her value, and one third of the freight; others again, for half the value of ſhip and freight.

In *England* the ſhip contributes for her full value and freight.

And ſhe ſhall be valued at the price ſhe was worth on her arrival at her port of delivery. And the freight is valued at the ſum the ſhip has earned on her arrival there.

In *England*, the ſhip is valued at the price ſhe was worth on her arrival at her port of delivery; and almoſt all foreign ſtates follow the ſame rule (*e*). The value of the freight is the clear ſum which the ſhip has earned after ſeamen's wages, pilotage, and all ſuch other petty charges as come under the denomination of *petty averages*,

(*a*) *Mo.* 297, *Show.* Ca. Parl. 19, R. *Birkley* v. *Preſgrave*, 1 *Eaſt* 220, ſup. 465.—(*b*) It is neceſſary to take the goods loſt into this account, otherwiſe the owner of them would be the only perſon who would not be a loſer.—(*c*) Vid. 1 *Mag.* 69, *Malloy*, tit. Aver. § 15.—(*d*) *Konigſberg*, *Hamburgh*, and *Copenhagen*. Vid. 2 *Mag.* 207, 237, 339.— (*e*) 2 *Mag.* ut ſup.

are deducted; of which the cargo bears two thirds, and the ſhip the remaining third.

How the jettiſon ſhall be valued.

As to the mode of valuing the jettiſon, the rule of the *Roman* law is, '*Portio autem pro æſtimatione rerum* '*quæ ſalvæ ſunt, et earum quæ amiſſæ ſunt, præſtari ſolet.* '*Nec ad rem pertinet, ſi hæ, quæ amiſſæ ſunt, pluris ve-* '*nire poterunt; quoniam detrimenti, non lucri, ſit præ-* '*ſtatio. Sed in his rebus, quarum nomine conferendum eſt,* '*æſtimatio debeat haberi, non quanti emptæ ſint, ſed quanti* '*venire poſſunt* (*a*). In *England* it was formerly the cuſtom to value goods at *prime coſt*, if the loſs happened before half the voyage was performed; but if after, then at the price they would have borne at the port of delivery (*b*). But that diſtinction is exploded, and it is now the ſettled practice with us, to eſtimate the goods loſt at the price they would have fetched at the port of delivery, on the ſhip's arrival there, freight, duties, and other charges being deducted (*c*).

Under the general words of the policy, the inſurer is bound to pay all average contributions.

Theſe contributions, under the general words of the policy, are a charge which the inſurer is bound to pay; and it makes no difference whether the inſured pay towards, or receive, them: He ought, in either caſe, to bear his proportion of the general loſs, and that muſt fall on the inſurer. The doctrine of *Roccus* is, '*Jactu* '*facto, ob maris tempeſtatem, pro ſublevanda navi, an tene-* '*antur aſſecuratores ad ſolvendum æſtimationem rerum jac-* '*tarum domino ipſarum? Dic eos non teneri, quia pro rebus* '*jactis ſit contributio, inter omnes merces habentes in illa navi* '*pro ſolvendo pretio domino ipſarum, et ideo ſi aſſecuratus re-* '*cuperat pretium rerum jactarum, non poteſt agere contra* '*aſſecuratores; tamen tenentur aſſecuratores ad reficiendum* '*illam ratam et portionem, quam ſolvit aſſecuratus in illam* '*contributionem faciendo inter omnes, habentes merces in illa* '*navi, quæ portio cum non recuperetur ab aliis, habetur* '*pro deperdita, et proinde ad illam portionem tenentur aſſe-* '*curatores* (*d*).'

(*a*) *Dig.* lib. 14, tit. 2, De lege Rhod. de jactu, § 4.—(*b*) *Mal.* Lex Merc. 113.—(*c*) *Molloy*, tit. Aver. § 15. Vid. 2 *Mag.* 100, 285, 339.—(*d*) *Roccus*, h. t. n. 62.

Sect.

Sect. 8.

Of Loſs by the Expence of Salvage.

AS the expence of ſalvage, like average contributions, is a charge for which the inſurer is liable, within the meaning of moſt policies (*a*), the ſubject of ſalvage muſt, like that of average, ſometimes incidentally occur in the conſideration of partial loſſes; and therefore it will be proper, under this head, to enquire in what caſes, and to what amount, ſalvage ſhall be a charge upon the inſurer.

Salvage what.

Salvage originally meant the thing or goods ſaved from ſhipwreck or other loſs; and in that ſenſe it is generally to be underſtood in our old books. But it is at preſent more generally underſtood to mean the allowance made to thoſe by whoſe means the ſhip or goods have been ſaved from the effects of ſhipwreck, fire, pirates, enemies, or any other loſs or misfortune. At common law, the party who has ſaved the goods of another from loſs or any imminent peril, has a *lien* on the goods, and may retain them in his poſſeſſion till payment of a reaſonable ſalvage, like that which a taylor, an inn-keeper, or a common carrier, has upon the clothes, the horſes, or the goods of his cuſtomer (*b*).

At common law the party has a *lien* on the thing ſaved, till payment of ſalvage.

How the expence of ſalvage is regulated in *England*.

Every maritime ſtate has certain regulations to aſcertain in what caſes, and to what amount, ſalvage ſhall be paid. To attempt to give an account of all ſuch regulations, in foreign countries, would be more a work of curioſity than of utility.—It will be ſufficient for our preſent purpoſe, to ſtate ſhortly the regulations which

(*a*) The policy, in caſe of loſs or misfortune, authorizes the inſured to ſue and labour for the recovery of the thing inſured, to the charges whereof the inſurers engage to contribute.—(*b*) Per *Holt*, C. J. in *Hartfort* v. *Jones*, 1 Lord *Ray*. 393; 2 *Salk*. 654; Vid. *Emerig*. tom. 2, p. 202. *Pothier*, h. t. n. 134.

the law of *England* has eſtabliſhed on this ſubject, and which will be principally found in our ſtatutes; ſome of which are of very antient date (*a*). But the regulations which are now principally in force, are found in the ſtat. 12 An. ſtat. 2. c. 18. and ſubſequent acts, made for the protection of ſhips and goods ſtranded on the coaſts of this kingdom.

By 12 An. ſtat. 2. c. 18, § 2. Perſons employed in the ſalvage of ſhips, &c. ſhall within 30 days be paid a reaſonable reward.

How this ſhall be ſecured to them.

That ſtatute, after directing the means to be employed for the preſervation of ſhips in diſtreſs, enacts, (§ 2.) 'That, all perſons who ſhall be employed in preſerving 'ſhips or veſſels in diſtreſs, or their cargoes, ſhall, with-'in 30 days after the ſervice performed, be paid a *rea-'ſonable reward* for the ſame, by the commander or 'other ſuperior officer, mariners, or owners of the ſhip 'or goods ſo ſaved; and in default thereof, the ſhip, 'veſſel, or goods ſo ſaved ſhall remain in cuſtody of the 'collector of the cuſtoms or his deputy, until all charges 'ſhall be paid, and until all perſons ſo employed ſhall 'be reaſonably gratified for their trouble; or good ſecu-'rity given, to the ſatisfaction of the ſeveral parties that 'are to receive the ſame. And in caſe the commander 'or other ſuperior officer, mariners, or owners, of the 'ſhip or goods ſo ſaved, ſhall diſagree with the ſaid 'officer of the cuſtoms, touching the money deſerved 'by the perſons ſo employed, the commander of the 'ſhip ſaved, or the owner of the goods therein, and the 'ſaid officer of the cuſtoms may nominate three neigh-'bouring juſtices, who ſhall adjuſt the *quantum* of the 'gratuity to be paid to the ſeveral perſons acting in the 'ſalvage of the ſhip or goods; and ſuch adjuſtment 'ſhall be binding to all parties, and ſhall be recoverable 'in an action at law to be brought by the reſpective 'perſons to whom the ſame ſhall be allotted by the juſ-'tices. And in caſe no perſon ſhall appear to make his 'claim to all or any of the goods ſaved, then the chief 'officer of the cuſtoms of the neareſt port, ſhall apply 'to three of the neareſt juſtices, who ſhall put him or

If the parties diſagree about the *quantum*, three neighbouring juſtices ſhall adjuſt it.

How the goods ſaved ſhall be diſpoſed of, if no owner appear.

(*a*) 3 *Ed.* I. c. 4; 4 *Ed.* I. c. 2; 27 *Ed.* III. c. 13.

ſome

'ſome reſponſible perſon in poſſeſſion of ſuch goods, 'ſuch juſtices taking an account thereof in writing, to 'be ſigned by ſuch officers of the cuſtoms; and if the 'goods ſhall not be legally claimed within 12 months, 'by the right owners, they ſhall be publickly ſold, or 'if periſhable forthwith ſold, and the produce of the 'ſale, after all charges deducted, with a fair account of 'the whole, ſhall be tranſmitted to the *Exchequer*, there 'to remain for the benefit of the owner, when appear-'ing; who, upon affidavit, or other proof of his right, 'to the ſatisfaction of one of the barons of the coif, 'ſhall, upon his order, receive the ſame out of the '*Exchequer*.

This ſtatute alſo preſcribes the puniſhment to be inflicted on perſons guilty of plundering or deſtroying ſhips in diſtreſs. But this being found inſufficient to repreſs theſe barbarous practices, the ſtat. 26 *G.* II, c. 19, has enacted a variety of further regulations for the more effectual puniſhment of offenders and the better protection of ſhips in diſtreſs.

On the ſubject of ſalvage, the 5th ſection of this act provides, that, 'In caſe any perſon, not employed in the 'ſalvage of the ſhip or goods, ſhall, in the abſence of 'the perſons ſo employed and authorized, ſave any ſuch 'ſhip or goods, and cauſe the ſame to be carried, for 'the benefit of the owners, into port, or to any near ad-'joining cuſtom-houſe, or other place of ſafe cuſtody, 'immediately giving notice thereof to ſome magiſtrate 'or cuſtom-houſe, or exciſe-officer; or ſhall diſcover to 'ſuch magiſtrate or officer where ſuch goods are wrong-'fully bought, ſold, or concealed, then ſuch perſon ſhall 'be entitled to a reaſonable reward for ſuch ſervices; 'to be paid by the maſter or owners of ſuch veſſels or 'goods; and to be adjuſted in caſe of diſagreement 'about the *quantum*, in like manner as the ſalvage 'is to be adjuſted and paid by virtue of the ſtat. '12 An.'

By 26 *G.* II, c. 19, § 5. Perſons, though not *employed* in the ſalvage, who ſhall ſave any ſhip or goods, or give notice of any goods unlawfully bought ſold, or concealed, ſhall be intitled to ſalvage.

And by § 6, 'For the better aſcertaining the ſalvage 'to be paid in purſuance of this and the former act, 'the

By § 6. The neareſt magiſtrate, collector of the cuſtoms,

or chief conſtable ſhall call a meeting of the ſheriff, magiſtrates, &c. five of whom may employ perſons for ſaving ſhips, &c.

'the juſtice, mayor, bailiff, collector of the cuſtoms, or chief conſtable, who ſhall be neareſt to the place where the ſhip or goods ſhall be ſtranded, ſhall forthwith give publick notice for a meeting, to be held as ſoon as poſſible, of the ſheriff, or his deputy, the juſtices, mayors, or other chief magiſtrates of towns, coroners, or commiſſioners of the land tax, or any five or more of them, who are required to give aid in the execution of this and the former act, and to employ proper perſons for the ſaving of ſhips in diſtreſs, and ſuch ſhips and effects as ſhall be ſtranded or caſt away; and alſo to examine perſons on oath touching the ſame, or the ſalvage thereof, and to adjuſt the *quantum* of ſuch ſalvage, and diſtribute the ſame among the perſons concerned in ſuch ſalvage, in caſe of diſagreement among the parties, or the ſaid perſons; and that every ſuch magiſtrate, &c. attending and acting at ſuch meeting, ſhall be paid four ſhillings a day for his expences, out of the goods ſaved by their care or direction.—Provided (§ 7.) that if the charges and rewards for ſalvage, directed to be paid by this and the former act, ſhall not be fully paid, or ſufficient ſecurity given for the ſame within 40 days after the ſervices performed, the officer of the cuſtoms concerned in ſuch ſalvage ſhall borrow or raiſe ſo much money as ſhall be ſufficient to pay ſuch charges, or any part thereof remaining unpaid, or not ſecured as aforeſaid, by or upon one or more bill or bills of ſale under his hand and ſeal, of the ſhip or veſſel, or cargo ſaved, or ſuch part thereof as ſhall be ſufficient, redeemable on payment of the principal ſum borrowed, and intereſt at 4 *per cent. per annum.*'

And examine perſons on oath, &c. to adjuſt the *quantum* of ſalvage.

Such magiſtrate, &c. to have 4s. a day.

By § 7, if the ſalvage be not paid, or ſecurity given within 40 days, the officer of the cuſtoms ſhall raiſe money by bill of ſale of the ſhip or goods ſaved, redeemable on payment of principal and 4 *per cent.* intereſt.

There are many other regulations in this act, as to the perſons by whom this and the former act ſhall be put in force, and as to the detection and puniſhment of offenders. The foregoing extracts which have been made for the purpoſe of ſhewing that, by our law, the ſalvage of ſhips or goods ſtranded or caſt away is a reaſonable ſatisfaction to the perſons employed in ſaving and protecting them for their labour; to be eſtimated, not according

cording to their own arbitrary will, but by perſons of the firſt reſpectability in and near the place where the misfortune happens,

How ſalvage upon a *recapture* was regulated by the marine law.

With reſpect to ſalvage in the caſe of recapture by the marine law of *England*, as practiſed in our courts of admiralty previous to any parliamentary regulations, if the ſhip or goods were retaken before condemnation, till which time the *jus poſtliminii* continued, the original owner was entitled to have reſtitution decreed to him, on payment of a *reaſonable ſalvage* to the recaptors. But by ſeveral ſtatutes (*a*), ſalvage upon a recapture was fixed at certain rates, according to the length of time the recaptured ſhip was in the hands of the enemy. It will be ſufficient, however, for our preſent purpoſe, to ſtate the regulations now in force as they were eſtabliſhed by the laſt prize act.

By ſtat. 33 *G.* III, c. 66, § 42. 'If any ſhip or veſſel, 'taken as prize, or any goods therein, ſhall appear, in the 'court of admiralty, to have belonged to any of his Ma- 'jeſty's ſubjects, which were before taken by any of his 'Majeſty's enemies, and at any time afterwards retaken 'by any of his Majeſty's ſhips, or any privateer, or other 'ſhip or veſſel under his Majeſty's protection; ſuch ſhips, 'veſſels, and goods ſhall, in all caſes, (ſave as hereafter 'excepted), be adjudged to be reſtored, and ſhall be ac- 'cordingly reſtored, to ſuch former owner or owners, he 'or they paying for ſalvage, if retaken by any of *his* '*Majeſty's ſhips, one eighth* part of the true value thereof, 'to the flag officers, captains, &c. to be divided as the 'ſame act directs: And if retaken by any *privateer*, or 'other ſhip or veſſel, *one ſixth* part of the true value of 'ſuch ſhips and goods, to be paid to the owners, officers 'and ſeamen of ſuch privateer or other veſſel, without 'any deduction. And if retaken by the joint operation 'of one or more of his Majeſty's ſhips, and one or more 'private ſhips of war, the judge of the court of admi-

By 33 *G.* III, c. 66, ſhips, &c. *at any time* recaptured, ſhall pay, if retaken by men of war, one *eighth*, if by privateers, one *ſixth*, for ſalvage.

If retaken by both jointly, the judge of the admiralty ſhall order ſuch ſalvage, and in ſuch proportions, as he ſhall deem fit.

(*a*) Vid. 13 *G.* II, c. 4, and 29 *G.* II, c. 34.

'ralty,

'ralty, or other court having cognizance thereof, ſhall 'order ſuch ſalvage, and in ſuch proportions, to be paid 'to the recaptors, by the owners, as he ſhall, under the 'circumſtances of the caſe deem fit and reaſonable (*a*).

But if the recaptured ſhip be ſet forth by the enemy as *a ſhip of war*, ſhe ſhall be lawful prize to the recaptors.

'But if ſuch recaptured ſhip or veſſel ſhall appear to 'have been ſet forth, by the enemy, as a ſhip or veſſel 'of war, the ſaid ſhip or veſſel ſhall not be reſtored to 'the former owners; but ſhall, in all caſes, whether 'retaken by any of his Majeſty's ſhips, or by any pri-'vateer, be adjudged lawful prize for the benefit of the 'captors."

The inſured need not *declare* for ſalvage, but may recover under a declaration for the loſs which occaſioned it, and for the damage the goods ſaved have ſuſtained.

As the inſurer does not, in expreſs words, undertake to pay ſalvage, perhaps the inſured could not declare for a loſs *by the payment of ſalvage*. That form of declaring might, perhaps, be thought too general. Indeed it would be uſeleſs to declare ſo, for he may declare as for that ſpecies of loſs which occaſioned the payment of ſalvage, and recover the ſalvage actually paid (*b*). And upon the ſame declaration he may recover for the loſs, if any, ſuſtained by damage done to the goods ſaved.

The court of admiralty regulates the rate of ſalvage in the caſe of recaptured neutrals.

Theſe regulations relate only to the ſalvage of *Britiſh* ſhips recaptured. In the caſe of neutral ſhips captured by the enemy, and retaken by *Britiſh* men of war or privateers, the court of admiralty have a diſcretionary power of allowing ſuch ſalvage, and in ſuch proportions, as, under the circumſtances of each particular caſe, may appear juſt. But there is no poſitive law, or binding regulation, to which parties may appeal to regulate the rate of ſuch ſalvage. *Some* ſalvage in ſuch caſes is generally allowed; and in practice the rate is uſually regulated by the ſame rules as in the caſe of *Britiſh* property.

(*a*) It ſeems a little ſingular that, in the caſe of a joint capture by men of war and privateers, the judge of the court of admiralty has power to order, not only the proportion of the ſalvage which each ſhall receive, but alſo to aſcertain the *amount* of the ſalvage which the owners ſhall pay to the recaptors.—(*b*) R. *Cary* v. *King*, Ca. Temp. *Hard*. 304. Vid. inf. ch. 17, § 2.

Before

Before an action will lie for a loſs by payment of ſalvage, the amount of ſuch ſalvage muſt have been aſcertained by the deciſion of the court of admiralty, which alone has juriſdiction to determine as to the *right* to ſalvage in all caſes, and, in the caſe of the recapture of neutrals, as to the *amount* of ſuch ſalvage.

Salvage muſt be paid under an adjudication of the court of admiralty, to entitle the inſured to claim it from the underwriters.

When the ſalvage, however, is very high, the inſured may abandon, and call upon the inſurer as for a total loſs, as we ſhall have occaſion more particularly to obſerve hereafter, in the chapter upon abandonment.

Sect. 9.

Of Wilful and Fraudulent Loſſes.

AT the concluſion of the ſixth ſection of the preſent chapter (*a*) we ſhortly adverted to the puniſhment of barratry by the laws of other countries. We will in the preſent ſection ſhew how piracy and other offences of this nature, and alſo the offence of procuring wilful and fraudulent loſſes, with intent to defraud inſurers, are puniſhable by the law of *England*.

How piracy is puniſhed by the law of *England*.

The crime of piracy, or robbery upon the high ſeas, is an offence againſt the univerſal law of ſociety; a pirate being, as Lord *Coke* deſcribes him, *hoſtis humani generis*. By the ancient common law, piracy, if committed by a *ſubject*, was held to be a ſpecies of treaſon, being contrary to his natural allegiance; and by an *alien*, to felony only: But now, ſince the ſtatute of treaſons, 25 *Ed.* III, c. 2, it is holden to be only felony in a ſubject (*b*). Formerly this offence was only cognizable by the admiralty courts, which proceed by the rules of the civil law (*c*). But it being inconſiſtent with the liberties of the nation, that any man's life ſhould be taken away,

(*a*) Sup. 459.—(*b*) 3 Inſt. 113.—(*c*) 1 *Hawk.* P. C. 98.

unleſs

unleſs by the judgment of his peers, the ſtat. 28 *H.* VIII, c. 15, eſtabliſhed a new juriſdiction for this purpoſe, which proceeds according to the courſe of the common law (*a*).

The offence of piracy, by the common law, conſiſts in the committing of thoſe acts of robbery and depredation upon the high ſeas, which, if committed upon land, would amount to felony there (*b*). But by ſtat. 11 and 12 *W.* III, c. 7, § 8 and 9. 'If any natural 'born ſubject commit any act of hoſtility upon the high 'ſeas, againſt others of his Majeſty's ſubjects, under 'colour of a commiſſion from any foreign power; 'or if any commander or mariner ſhall betray his truſt, 'and run away with any ſhip, boat, ordnance, ammu-'nition or goods; or yield them up voluntarily to any 'pirate; or bring any ſeducing meſſage from any pi-'rate, enemy, or rebel; or conſult, combine, or con-'federate with, or attempt to corrupt, any officer or 'mariners to yield up, or run away with, any ſhip or 'goods, or turn pirate; or ſhall lay violent hands on 'his commander, to hinder him from fighting in de-'fence of his ſhip; or ſhall confine him, or make, or 'endeavour to make, any revolt in the ſhip, ſhall be 'adjudged to be a pirate, felon, and robber, and ſhall 'ſuffer death and loſs of lands, as a pirate, felon and 'robber on the ſea ought to ſuffer, whether he be 'principal, or merely acceſſary by ſetting forth ſuch 'pirates, or abetting them before the fact, or receiving 'or concealing them or their goods, after it:' And the ſtat. 4 *G.* I, c. 11, expreſsly excludes the principals from the benefit of clergy. By the ſtat. 8 *G.* I, c. 24, trading with known pirates, or furniſhing them with ſtores or ammunition, or fitting out any veſſel for that purpoſe; or confederating or correſponding with them, or forcibly boarding any merchant veſſel, though without ſeizing or carrying her off, and deſtroying or throwing

(*a*) Vid. 4. *Bl.* Com. 71.—(*b*) 1 *Hawk.* P. C. 100.

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any of the goods overboard, ſhall be deemed piracy; and ſuch acceſſaries to piracy as are deſcribed in the above ſtat. 11 and 12 *W.* III, are declared to be principal pirates, and all pirates convicted by virtue of this act, are made felons without benefit of clergy. Thus does the ſtatute law of *England* aid and enforce the law of nations, as a part of the common law, by inflicting an adequate puniſhment upon offences againſt that univerſal law.

The ſtat. 1 *An.* ſt. 2, c. 9, § 4 and 5, makes it a ſimple felony in any maſter or mariner, wilfully to caſt away, burn, or deſtroy any ſhip to which he belongs, to the prejudice of the *owner*, or of any *merchant who ſhall load goods thereon*; and takes away the benefit of clergy from ſuch offences, *committed on the high ſeas.*

The 1 *An.* ſt. 2, c. 9, makes it felony to deſtroy any ſhip, to the prejudice of the owners of the ſhip or goods on board; and takes away clergy, if committed at ſea.

Though the inſurers are only anſwerable for loſſes ariſing from the *accidents and misfortunes* incident to maritime adventures, and not for ſuch as proceed from contrivance or deſign on the part of the inſured; yet the temptation to defraud inſurers by the wilful and concerted deſtruction of ſhips and goods inſured, in order to give a colour to fraudulent claims for pretended loſſes, has been found productive of ſo many evils, that it became neceſſary for the legiſlature to interpoſe its authority to reſtrain them: And therefore, by ſtat. 4 *G.* I, c. 12, § 3, 'If any owner, captain, maſter, mariner, or other officer of any ſhip, ſhall wilfully caſt away, burn, or otherwiſe deſtroy the ſhip, of which he is owner, or to which he belongs; or in any manner direct or procure the ſame to be done, to the prejudice of the perſon or perſons that ſhall underwrite any policy of inſurance thereon; or of any merchant that ſhall load goods thereon, ſhall ſuffer death.'

The 4 *G.* I. c. 12, extends this to the caſe of the owner or maſter who ſhall deſtroy any ſhip to the prejudice of the owners of, or underwriters upon goods.

This ſtatute having only made this crime a ſimple felony, it was found inſufficient to reſtrain the commiſſion of it, and therefore the ſtat. 11 *G.* I, c. 29, § 6 and 7, takes

The 11 *G.* I. c. 29, takes away clergy from ſuch offenders in all caſes.

7, takes away from it the benefit of clergy, and inflicts the ſame puniſhment on perſons guilty of the like offences, '*with intent to prejudice any owner of ſuch ſhip:*' And it further enacts that if ſuch offences be committed within the body of any county, they ſhall be tried in the ſame manner as other felonies; if on the high ſeas, then according to the directions of the ſtat. 28 *H.* 8, c. 15.

CHAP.

CHAP. XIV.

Of Abandonment.

Preliminary Obſervations.

Nature of abandonment.

IT has already been obſerved (*a*) that the term *total loſs* does not only ſignify the abſolute deſtruction of the thing inſured, according to its natural import; but alſo that, in legal and commercial language, it means ſuch a loſs or damage to the thing inſured, though it ſpecifically remain, as renders it of little or no value to the owner. It alſo means any loſs or misfortune whereby the voyage is loſt, or become not worth purſuing, and the projected adventure fruſtrated. In ſuch caſes the inſured is entitled to call upon the inſurer as for a total loſs: But then he muſt *abandon*; that is, he muſt renounce and yield up to the inſurer all his right, title, and claim to what may be ſaved, and leave it to him to make the moſt of it for his own benefit. The inſurer then ſtands in the place of the inſured, and becomes legally entitled to all that can be reſcued from deſtruction (*b*). The idea of abandonment therefore, pre-ſuppoſes a total loſs in this latter ſenſe, and implies that ſomething remains which may be ſaved, and which may be given up, or abandoned, to the inſurers. For if the inſured could only abandon, in the caſe of a total loſs, in the ſtrict and natural ſenſe of the words, there would be nothing to abandon, and abandonment could then be only an uſeleſs form.

Whether coeval with inſurance itſelf.

It has been ſaid that the practice of abandoning dates its origin from the period when the contract of inſurance itſelf firſt came into uſe (*c*); and yet it does not ſeem to be a right which neceſſarily reſults from the nature

(*a*) Sup. 414.—(*b*) Vid. *Pothier*, h. t. n. 133. Ord. *Louis* XIV, h. t. art. 47. Ord. *Bilboa*, art. 32. 1 *Vez.* 98. (*c*) *Park* 143.

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of the contract.—That the loſs or damage ſhould be made good by the inſurer, who has made himſelf reſponſible, is perfectly reaſonable, and conformable to the ſpirit of the contract. But it does not neceſſarily follow from thence, that, in caſe of a diſaſter, he ſhould be *forced* to become the proprietor of the ſhip or goods inſured, merely becauſe he was a ſurety for their ſafe arrival; indeed the author of *Le Guidon* ſays, that abandonment is only to be reſorted to in extreme caſes *(a)*.

Its probable origin.

It ſeems more probable that abandonment aroſe from the practice of occaſionally introducing into policies particular ſtipulations, that if the thing inſured ſhould be ſpoiled or greatly damaged by any of the perils inſured againſt, it ſhould be abandoned to the inſurers, who ſhould be thereupon obliged to pay the entire ſum inſured; and that ſimply making good the damage ſhould not be ſufficient to diſcharge them; and ſtipulations like this, being frequently introduced into the contract, became at length the foundation of general rules, which have been eſtabliſhed by poſitive law in ſome countries, and adopted in others as part of the general law of inſurance.

Whether it has been carried too far.

Be this as it may, it has been thought that in many inſtances the practice of abandoning has been carried too far: and that the inſured ſhould, in no caſe, be permitted to abandon, where the effects inſured, or the greateſt part of them, ſtill exiſt, aud are in the power of the inſured. Mr. Juſtice *Buller* ſeems to have been of opinion, that when this queſtion firſt came before our courts, it would have been the wiſeſt policy to have determined that the owners ſhould in no caſe be allowed to abandon, where the property ſtill exiſted *(b)*. The firſt caſe we find in our books on the right of abandonment, came before Lord *Hardwicke* in the court of Chancery in the year 1744; and he, after ſome deliberation, determined that where a recaptured ſhip and cargo were ſold to pay the ſalvage, the inſured had a right to abandon the ſurplus, and claim as for a total loſs *(c)*.

(a) *Le Guidon*, c. 7, art. 1.—*(b)* Vid. 1 T. R. 615, 616.—*(c)* Vid. *Pringle* v. *Hartley*, 3 *Atk.* 195, inf. 495.

It muſt be admitted, that the privilege of abandoning in every caſe which is deemed a total loſs may ſometimes be liable to great abuſe. Where, as in the caſe of capture, the thing inſured, and every part of it, is completely gone out of the power of the inſured, it is juſt and proper that he ſhould recover at once as for a total loſs, and leave the *ſpes recuperandi* to the inſurer who will have the benefit of a recapture, or of any other accident by which the thing may be recovered. But it ſeems, at firſt ſight, impolitic, not to ſay unreaſonable, that the owner of a ſhip which is ſtranded, (the captain and crew being his ſervants, on the ſpot, and in poſſeſſion of the ſhip and cargo), ſhould be at liberty to abandon theſe to a number of underwriters who ſometimes find it difficult to act in concert, and who have, perhaps, no means of diſpoſing of the property thus thrown upon their hands, but to the greateſt diſadvantage.

On the other hand, it may be truly ſaid that the captain muſt occaſionally be the agent, not only of the owners or freighters of the ſhip, but alſo of every perſon intereſted either in the ſhip or cargo; that he, in caſe of misfortune, is bound to do the beſt in his power for the benefit of all concerned; and that, whether he diſpoſes of what is ſaved for account of the inſured, or the inſurer, comes to the ſame thing, ſince in both caſes the amount muſt go in diminution of a total loſs. Perhaps, too, the notice of abandonment, which may, in ſome caſes, enable the underwriters to ſuperintend the diſpoſal of what may be ſaved, may ſometimes be productive of very beneficial effects, in preventing frauds.

In treating this ſubject we will conſider,

1. In what caſes the inſured may abandon;
2. Within what time this muſt be;
3. The form of the abandonment;
4. The effect of it;
5. Of the ordering and diſpoſal of the effects abandoned.

Sect. 1.

In what caſes the inſured may abandon.

The general principle upon which the right of abandoning exiſts.

IN general it may be laid down that, by the law of inſurance, as underſtood in *England*, the inſured may abandon in every caſe where, by the happening of any of the misfortunes or perils inſured againſt, the voyage is loſt, or not worth purſuing, and the projected adventure is fruſtrated; or where the thing inſured is ſo damaged and ſpoiled as to be of little or no value to the owner; or where the ſalvage is very high; or where what is ſaved is of leſs value than the freight; or where further expence is neceſſary, and the inſurer will not undertake, at all events, to pay that expence, &c. (*a*).

In what caſes it is permitted in *France*.

The ordinance of the marine of *Louis* XIV. (*b*) which in this, as in moſt other particulars, is collected from the ſame ancient ſources from whence other countries have drawn their principles of the law of inſurance, confines abandonment to theſe five caſes; capture, ſhipwreck, ſtranding, arreſt of princes, or the *entire loſs of the effects inſured* (*c*).

Valin thinks the latter words mean, not an abſolute deſtruction, but a *general loſs* (*d*).—*Pothier* ſays they mean a total, or *almoſt* total, loſs (*e*). This he explains by ſaying, that goods which are conſiderably damaged are deemed to be goods loſt; and therefore when all, or almoſt all the goods are in that ſtate, it is a total loſs. Both theſe authors cite *Le Guidon*, which lays it down that the inſured may abandon when there is an average loſs or damage which exceeds half the value of the goods inſured,

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(*a*) Per Lord *Mansfield*, in *Mills* v. *Fletcher*, inf. 497.—(*b*) h. t. art. 46.—(*c*) "*Perte entiere des effets aſſurés.*"—(*d*) "*Perte generique des effets aſſurés, ſans être abſolue.*" *Valin* ſur art. 19, h. t. p. 61.—(*e*) "*Perte totale ou preſque totale des effets aſſurés.*" *Pothier*, h. t. n. 119.

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or in caſe they be ſo damaged as not to be worth the freight or little more (*a*).

Emerigon objects to both theſe interpretations, as being vague and uncertain, and as leaving it too much in the breaſt of the judge to decide what ſhall be an *entire*, or *almoſt* entire, loſs, which, he ſays, muſt lead to great doubts and ruinous litigation (*b*).

By the *French* law, the right to abandon ſeems to depend on the *ſpecies of misfortune* which has happened; with us it depends rather on the *degree of loſs* ſuſtained in conſequence of it.

Such are the general principles upon which the right of abandoning reſts: We will now take a view of the caſes in which thoſe principles have been exemplified, *firſt*, upon loſſes by capture, and arreſt of princes; and *ſecondly*, upon other loſſes.

1. *Of the right of abandoning, upon capture, and arreſt of Princes.*

As capture and arreſt of princes have afforded the moſt frequent occaſions for abandonment, ſo moſt of the great leading principles upon which the right of abandoning reſts, have been fully diſcuſſed and eſtabliſhed in caſes of that ſort.

Capture by an enemy or a pirate, or an arreſt of princes, or even an embargo, is *primâ facie* a total loſs; and immediately upon the capture, or upon a mere arreſt, or at any time while the ſhip continues under detention, the inſured may elect to abandon, and give notice to the inſurer of his intention ſo to do; and thus entitle himſelf to claim as for a total loſs from the inſurer. For, from the moment of the capture, the owners loſe their power over the ſhip and cargo, and are deprived of the free diſpoſal of them; and, in the opinion of the merchant,

Capture or arreſt of princes, is *primâ facie*, a total loſs.

(*a*) "*Le marchand chargeur eſt en liberté de faire à ſes aſſureurs de la propriété qu'il a en la marchandiſe chargée, lors et quand il advient avarie qui excéde ou endommage la moitié de la marchandiſe ou telle empirance en la marchandiſe qu'elle ne value le frêt, ou peu de choſe a'avantage.*" *Le Guidon*, ch. 7, art. 2.—(*b*) *Emerig.* tom. 2, p. 183.

his right of diſpoſal being ſuſpended or rendered uncertain, is equivalent to a total deprivation. It would therefore be unreaſonable to oblige the inſured to wait the event of capture, detention, or embargo (*a*).

Upon a wager policy the inſured cannot abandon.

There is this difference between a policy *upon intereſt*, and a *wager policy*, that in the one caſe the inſured may, if he think proper, abandon the moment he has notice of a capture or detention, and this will bind the underwriters, whatever may be the ultimate fate of the ſhip; but in the caſe of a wager policy there can be no abandonment, becauſe the inſured has nothing to abandon (*b*).

But a capture or arreſt does not *neceſſarily* terminate in a total loſs.

But a capture or arreſt does not neceſſarily, and at all events, terminate in a total loſs, ſo as to entitle the inſured to abandon; for as he cannot abandon till he has received advice of the loſs; if, at the time he receives ſuch advice, or before he has elected to abandon, he receive advice that the ſhip or goods inſured are recovered, or are in ſafety, he cannot then abandon; becauſe he can only abandon *while* it is a total loſs, and he knows it to be ſo; not after he knows of the recovery. Therefore, if a captured ſhip be retaken and permitted to proceed on her voyage, ſo that ſhe ſuffers but a ſmall temporary inconvenience; this would only be a partial, and not a total loſs (*c*).

Neither does a recapture neceſſarily deprive the inſured of the right to abandon.

On the other hand, a title to reſtitution upon a recapture does not neceſſarily, and at all events, deprive the inſured of the right to abandon: For if, in conſequence of the capture, the voyage be loſt, or not worth purſuing; if the ſalvage be very high; if farther expence be neceſſary, and the inſurer will not undertake at all events

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(*a*) Vid. 2 *Bur.* 696, ſup. 429.—(*b*) Vid. Lord *Mansfield's* judgment in *Kulen Kemp* v. *Vigne*, 1 T. R. 304, ſup. 106.—(*c*) By the law of *France*, the ſhip being once captured, it is always a total loſs; and the legal effect of it is preſumed to continue, though the ſhip be releaſed or retaken. The recovery of the goods inſured is only for the account of the inſurer, who cannot, under pretence that they are arrived at their port of deſtination, refuſe the abandonment. The recovery of the goods is merely in nature of ſalvage. *Emerig.* tom. 2, p. 188.

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to pay it, he may abandon.—The rule is, that, if the thing insured be recovered before any loss is paid, the insured is entitled to claim as for a total, or a partial loss, according to the final event; that is, according to the state of the case at the time he makes his claim. There is no vested right to a total loss, till the insured, having a right to abandon, elects to do so; for he is only entitled to an indemnity for his loss as it stands at the time of the action brought, or offer to abandon.

If the thing insured be recovered before the loss is paid, the loss will be total or partial, according to the final event.

But if, after a total loss has been actually paid, the thing insured be recovered, the insurer cannot oblige the insured to refund the money he has received; but he shall stand in the place of the insured, and so no injustice is done.

But if, after a total loss has been paid, the thing insured be recovered, the insured shall not be obliged to refund.

The two following cases are cited as examples to shew that though a captured ship be recaptured, yet if the voyage be lost, the loss will be total, and the insured will have a right to abandon.

Though there be a recapture, yet, if the voyage be lost, the insured may abandon.

The first was the case of a ship insured from *London* to *Bermudas* and *Carolina*, taken by a *Spanish* privateer, and carried into *Boston* in *America*, where no person appearing to give security or answer for the moiety to satisfy the salvage, she was condemned and sold in the court of admiralty there. The recaptors had their moiety of the proceeds, and the surplus remained in the hands of the officers of the court. —An action at law was brought upon the policy by the insured, who obtained a verdict against the underwriter for a total loss. The underwriter filed a bill in Chancery, and moved for an injunction to stay the proceedings at law; insisting that the insured ought not to recover more than the moiety of the loss, as the stat. 13 *G.* II. c. 4, § 18, gave the thing saved to the owner, who was intitled to receive it from the officers of the admiralty court at *Boston*. The insured, in his answer, swore that he had *offered*, and was now willing, to *relinquish* his interest to the insurers in the benefit of the salvage, and would give them a letter of attorney to receive it.—Lord *Hardwicke* C. determined that there was no ground for an injunction in this case.—He said,—"At the time of the trial, the insured knew that the ship was retaken.—The ques-

A ship is taken, and retaken, and sold in a distant country to pay the recaptors for the salvage, and the residue of the produce of the sales, remains in the court of admiralty there: The insured may abandon, and recover as for a total loss.

Pringle v. *Hartley*, in Chan. 1744, 3 *Atk.* 195.

tion ariſes on the ſtat. 13 *G.* II. with regard to the ſalvage. It has been ſaid, that there ought to be only half the loſs recovered on the policy; and, as to that, the act has made great alteration in the law of nations, with reſpect to recaptures. The carrying a ſhip *infra præſidia hoſtium*, or *ſi pernoctaverit* with the enemy, makes it the prize of the recaptor, as if it had been originally the ſhip of the enemy; but, by the act, the recapture reveſts the property in the owner. If there had been a ſalvage, it muſt have been deducted out of the money recovered under the policy; but if none came to the hands of the inſured, the jury could not take notice of it. It is uncertain whether the inſured will receive any thing or not: And if any thing be recovered, he muſt have had an allowance for his expences in recovering it. Therefore, being willing to *relinquiſh his intereſt* in the ſalvage, he ought to have recovered *the whole money inſured.* It would be miſchievous if it were otherwiſe; for then, upon a recapture, the inſured would be in a worſe ſituation than if the ſhip were totally loſt."

A ſhip, after throwing part of her cargo overboard in a ſtorm, and being diſabled from proceeding on her voyage till refitted, is captured and her crew taken out: But after being eight days in poſſeſſion of the enemy, is recaptured and carried into an *Engliſh* port, upon which the inſured give notice to abandon. Before the ſhip can be refitted, the reſt of the cargo is ſpoiled:—This is a total loſs, and the inſured may abandon.

In the ſecond caſe, two inſurances were made, the one on the ſhip *David* and *Rebecca*, the other on goods on board, "At and from *Newfoundland* to her port of diſcharge in "*Portugal* or *Spain*, without the *Streights*, or *England*."—In an action upon the former policy, the plaintiff declared upon a total loſs by capture; upon the latter, the declaration alledged that divers quantities of fiſh and other merchandizes, were put on board; and averred that one fourth of the ſaid goods were neceſſarily thrown overboard in a ſtorm, to preſerve the ſhip and the reſt of the cargo; after which *jettiſon*, the ſhip and the remainder of the goods, were taken by the *French*.—It appeared on the trial, that the ſhip was taken on the 23d of *December* 1756; and the maſter, mates, and all the ſailors, except an apprentice and a landman, were taken out of her and carried to *France*. The ſhip remained in the hands of the *French eight days*, and was then retaken by a *Britiſh* privateer, and brought into *Milford Haven* on the 18th of *January*; and *immediate notice* was given by the inſured to the

Goſt v. *Withers*, 2 *Bur.* 683.

the inſurers, with an offer to abandon. Before the capture, the ſhip, in a violent ſtorm, was ſeparated from her convoy, and ſo diſabled as to be incapable of proceeding on her voyage, without going into ſome port to refit. Part of her cargo was thrown overboard in the ſtorm, and the reſt ſpoiled, while the ſhip lay at *Milford Haven* after the offer to abandon, and before the ſhip could be refitted.—Upon this caſe, two queſtions were made; 1ſt. Whether this was a loſs by capture for which the inſurers were liable. 2dly. Whether, under all the circumſtances, the inſured had a right to abandon the ſhip to the inſurers after ſhe was carried into *Milford Haven*.—The court, upon great conſideration, were clearly of opinion, that the loſs was total by the capture; and that, after the voyage was defeated, the right which the owner had to obtain reſtitution of the ſhip and cargo, paying ſalvage to the recaptors, might be abandoned to the inſurers, after ſhe was brought into *Milford Haven*.—Lord *Mansfield* delivered the opinion of the court. The deciſion of the firſt point has been already mentioned in its proper place (*a*). Upon the ſecond point, his lordſhip ſaid,—"The ſingle queſtion upon which this caſe turns, is, whether the inſured had, under all the circumſtances, an election to abandon on the 18th of *January*. The loſs and diſability were in their nature total at the time they happened. During eight days the plaintiff was entitled to be paid by the inſurer, as for a total loſs; and in the caſe of a recapture, the inſurer would have ſtood in his place. The ſubſequent recapture is, at beſt, a ſaving only of a ſmall part: *Half the value muſt be paid for ſalvage*. The diſability to purſue the voyage ſtill continued. The maſter and mariners were priſoners. The charter-party was diſſolved. The freight, except in the proportion of the goods ſaved, was loſt. The ſhip was neceſſarily brought into an *Engliſh* port. What could be ſaved might not be worth the expence neceſſarily attending it. The ſubſequent title to reſtitution ariſing from the recapture, at a great

A title to reſtitution ariſing from recapture, cannot take away a veſted right to abandon, if the ſhip be unfit to perform the voyage.

(*a*) Sup. 102.

great expence (*a*), of a ſhip diſabled from purſuing her voyage, cannot take away a right veſted in the inſured at the time of the capture. But becauſe he cannot recover for any more than the loſs he has ſuſtained, he muſt abandon what may be ſaved. The better opinion of the books ſays,—"*Sufficit ſemel extitiſſe conditionem, ad beneficium aſſe-*"*curatori, de amiſſione navis; etiam quod poſtea ſequeretur*"*recuperatio: Nam per talem recuperationem non poterit præ-*"*judicari aſſecuratio* (*b*)." I cannot find a ſingle book, ancient or modern, which does not ſay that, in caſe of a ſhip *being taken*, the inſured may demand as for a total loſs and abandon. What proves the propoſition moſt ſtrongly is, that by the general law, he may abandon in the caſe merely of arreſt, or an embargo, by a prince *not* an enemy (*c*). Poſitive regulations in different countries, have fixed a preciſe time before the inſured ſhould, in that caſe, be at liberty to abandon. The fixing a preciſe time proves the general principle. Every argument holds ſtrongly in the caſe of the other policy, with regard to the goods. The cargo was, in its nature, periſhable, deſtined from *Newfoundland* to *Spain* or *Portugal*; and the voyage was as abſolutely defeated, as if the ſhip had been wrecked, and a third or fourth of the goods ſaved. No capture by the enemy can be ſo total a loſs as to leave no poſſibility of recovery. If the owner himſelf ſhould retake at any time, he will be intitled; and by the ſtat. 29 *G.* II. c. 34, § 24, if an *Engliſh* ſhip retake at any time, before the condemnation or after, the owner is entitled to reſtitution, upon ſtated ſalvage. This chance does not ſuſpend the demand upon the inſurer for a total loſs: But juſtice is done by putting him in the place of the inſured, in caſe of a recapture. In queſtions on policies, the nature of the contract, as an indemnity and nothing elſe, is always liberally conſidered. There might be circum-

The inſured may abandon upon a mere arreſt or embargo by a prince not an enemy.

(*a*) By 29 *G.* II. c. 34, § 2, a moiety of the value of the captured ſhip was given to privateers, if the prize was above 96 hours in the poſſeſſion of the enemy. But now by 33 *G.* III. c. 66 § 42, the ſalvage in all caſes of recapture, by *privateers*, is fixed at *one-ſixth*.—(*b*) *Roccus*, n. 66.—(*c*) Vid. ſup. 434.

ſtances

ſtances, under which a capture would be but a ſmall temporary hindrance to the voyage; perhaps none at all: As if a ſhip were taken, and, in a few days, eſcaped entire, and purſued her voyage. There are circumſtances under which it would be deemed an average loſs: If a captured ſhip be immediately ranſomed (*a*) by the maſter, and purſue her voyage: there, the money paid is an average loſs. And in all caſes the inſured may chuſe not to abandon (*b*). In the ſecond part of the uſages and cuſtoms of the ſea, (a tranſlation from the *French*), a treatiſe is inſerted called *Le Guidon*, in which, after mentioning the right to abandon upon a capture, it is added, "or any other ſuch diſturbance as defeats the voyage; or makes it not worth while, or not worth the freight, to purſue it (*c*)." I know that, in late times, the privilege of abandoning has been reſtrained for fear of letting in frauds: And the merchant cannot elect to turn what, at the time when it happened, was in its nature, but an average loſs, into a total one, by abandoning. But there is no danger of fraud in the preſent caſe. The loſs was total at the time it happened; and continued total, as to the deſtruction of the voyage. Nothing could be recovered, but upon payment of more than half the value, including the coſts. What could be ſaved of the goods might not be worth the freight, for ſo much of the voy-

When the capture proves but a ſmall temporary hindrance, the inſured cannot abandon.

As if the ſhip be immediately ranſomed, and purſues her voyage.

The inſured is in no caſe *obliged* to abandon.

He may abandon if the voyage be defeated or not worth purſuing.

But he cannot, merely by abandoning, turn a partial into a total loſs.

(*a*) Since this judgment was delivered, the ranſoming of ſhips captured by the enemy has been prohibited by ſtat. 22 G. III. c. 35. ſup. 432.—(*b*) *Le Guidon*, ch. 7, art. 1, ſays that abandoment depends on the will of the inſured, who may reſort to it as an *extreme remedy*.—(*c*) The paſſage in *Le Guidon* to which his lordſhip alludes, c. 7, § 1, is in theſe words: "Il eſt en liberté au marchand chargeur faire *delais* à ſes aſſureurs, c'eſt à dire, quitter et delaiſſer ſes droits, noms, raiſons, et actions, de la propriété qu'il a en la marchandiſe chargée, dont il eſt aſſeuré, lors, et quand il advient naufrage du tout ou de partie, ou bien avarie qui excéde ou endommage la moitié de la marchandiſe, quand il y a priſe d'amis ou d'ennemis, arreſt de prince, ou autre tel diſtourbier en la navigation; ou telle empirance en la marchandiſe, qu'il n'y ait moyen l'avoir fait naviger à ſon dernier réſte, *ou qu'elle ne valut le frêt, ou peu de choſe d'avantage.*"

age

age as they had gone when they were taken. The cargo, from its nature, muſt have ſold where it was brought in. The loſs, as to the ſhip, could not be eſtimated, nor the ſalvage of half be fixed, by a better meaſure than a ſale. In ſuch a caſe, there is no colour to ſay that the inſured might not diſentangle himſelf from unprofitable trouble and further expence, and leave the inſurer to ſave what he could. It might as well be argued that if a ſhip which had ſunk, was weighed up again, at a great expence, the crew having periſhed, the inſured could not abandon, nor the inſurer be liable, becauſe the body of the ſhip was ſaved."

It is not univerſally true that becauſe a ſhip has once been captured the inſured may abandon at any time afterwards.

In the above caſe Lord *Mansfield* declared, "*that he could not find a ſingle book, ancient or modern, which did not ſay that, in caſe of a ſhip being taken, the inſured may demand as for a total loſs, and abandon.*—The unqualified terms in which this is expreſſed, ſoon gave riſe to a notion that the immediate conſequence of a capture was a *change of property* in the thing inſured, which veſted in the inſured a right to abandon when he pleaſed; and that he could not be diveſted of this right by any ſubſequent event. —That Lord *Mansfield* did not mean to be thus underſtood is obvious from the whole of his judgment in that caſe. But another caſe ſoon after occurred which afforded him an opportunity of explaining his own meaning in that judgment, and of ſettling and aſcertaining thoſe principles of law which have governed all the caſes to which they were applicable, from that time to the preſent.

The rule is that if the thing inſured be recovered before any loſs is paid, the inſured is only entitled to a partial or a total loſs, according to the final event.

In this caſe it was ſettled, after ſolemn argument, and upon great conſideration, that if the thing inſured be recovered before any loſs is paid, the inſured can only be intitled to a total or a partial loſs, according to the final event. This agrees with *Roccus* who puts this queſtion: —*Aſſecurator qui jam ſolvit æſtimationem merchum deperditarum, ſi poſtea dictæ merces appareant et recuperatæ ſint, an poſſit cogere dominum ad accipiendas illas, et ad reddendam ſibi æſtimationem quam dedit?*—To this queſtion he anſwers thus: *Diſtingué: Aut merces, aut aliqua pars ipſarum appareant,*

pareant, et reſtitui poſſint ante ſolutionem æſtimationis; et tunc tenetur dominus mercium illas recipere, et pro illa parte mercium apparentium liberabitur aſſecurator: Nam qui tenetur ad certam quantitatem reſpectu certæ ſpeciei, dando illam, liberatur. Et etiam, quia contractus aſſecurationis eſt conditionalis, ſcilicet, ſi merces deperdantur: Non autem dicuntur deperditæ, ſi poſtea reperiantur. Verum, ſi merces non appareant in illa priſtina bonitate, aliter fit æſtimatio; non in totum, ſed prout tunc valent. Aut vero poſt ſolutam æſtimationem ab aſſecuratore compareant merces, et tunc eſt in electione mercium aſſecurati, vel recipere merces vel retinere pretium (a).

A ſhip is captured, and all the hands but the mate and one man taken out of her. After 17 days, ſhe is recaptured and ſent into an *Engliſh* port, where ſhe arrives a month after the capture: Yet, the voyage not being loſt, the inſured ſhall not be allowed to abandon after the ſhip's arrival.

Hamilton v. *Mendes*, 2 *Bur.* 1198, 1 *Bl.* 276.

The caſe above alluded to, was an inſurance on the ſhip *Selby*, *valued* at 1200 l. and goods on board, from *Virginia* to *London*.—The ſhip ſailed on the 28th of *March* 1760, from *Virginia* for *London*, and on the 6th of *May* was captured by a *French* privateer. The captain and ſix men were taken out of the ſhip, and only the mate and one man left on board. The *French* put a prize-maſter and ſeveral men on board to carry the ſhip to *France*; but in the way thither, ſhe was retaken on the 23d of *May* by an *Engliſh* man of war off *Bayonne*, and ſent into *Plymouth*, where ſhe arrived the 6th of *June*. The plaintiff, at *Hull*, as ſoon as he was informed of what had befallen his ſhip, wrote on the 23d of *June* to his agent in *London* to acquaint the defendant, "that the plaintiff did "from thence abandon to him his intereſt in the ſaid "ſhip as to the 100 l. inſured by the defendant."—The agent, on the 26th of *June*, acquainted the defendant with the offer to abandon, to which the defendant anſwered, "that he did not think himſelf bound to take to "the ſhip; but was ready to pay the ſalvage, and all "other loſſes and charges that the plaintiff had ſuſtained "by the capture."—On the 19th of *Auguſt* the ſhip, which had ſuſtained no damage by the capture was brought to *London* by order of the owners of the cargo and the recaptors, and the whole cargo delivered to the freighters, who paid the freight without prejudice.—The queſtion

(a) *Roccus*, h. t. n. 9, 50.

on this caſe was, whether the plaintiff, on the 26th of *June*, had a right to abandon, and to recover as for a total loſs.—The court determined that he had no right to abandon, and that he could recover as for average loſs only.—Lord *Mansfield*, in delivering the opinion of the court ſaid,—" The plaintiff has averred in his declaration, as the baſis of his demand for a total loſs, *that, by the capture, the ſhip became wholly loſt to him.* The general queſtion is, whether the plaintiff, who, at the time of his action, brought at the time of his offer to abandon, and at the time of his being firſt apprized of any accident having happened, had only, in truth, ſuſtained a *partial loſs*, ought to recover as for a *total one.* In ſupport of the affirmative, the counſel for the plaintiff inſiſted upon the four following points: 1, That, by the capture, *the property was changed*, and therefore the loſs total for ever: 2, If the property was not changed, yet the *capture* was a total loſs: 3, That when the ſhip was brought into *Plymouth*, particularly on the 26th of *June*, the recovery was not ſuch as, in truth, changed the total, into an average, loſs: 4, Suppoſing it did, yet the loſs having once been total, a right *veſted* in the inſured to recover the whole, upon abandoning; which right could never afterwards be *diveſted*, or taken from him, by any ſubſequent event.—As to the *firſt point*: If the change of property was at all material, as between the inſurer and the inſured, it would not be applicable to the preſent caſe; becauſe by the marine law received and practiſed in *England*, there is no change of property, in the caſe of a capture, till condemnation; and now by the act of parliament (*a*), in caſe of a recapture, the *jus poſtliminii* continues for ever. Many writers argue, between the inſurer and the inſured, from the diſtinction, whether the property was, or was not, ſo changed by the capture, as to tranſfer a complete right from the enemy to a recaptor, or neutral vendee, againſt the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner

By the marine law, the property was not changed by the capture, till after condemnation. But ſince the 29 *G.* II. c. 34, the *jus poſtliminii* continues for ever.

(*a*) 29 G. II. c. 34, § 24.

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and recaptor or vendee, ought never to be the rule of deciſion, as between the inſurer and inſured, upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree, upon the *ſecond point*, that, by the capture, *while it continued*, the ſhip was totally loſt; but it muſt be admitted that the property, in caſe of recapture, never was changed, but returned to the former owner.—The *third point* depends, as every queſtion of this kind muſt, upon the particular circumſtances. It does not *neceſſarily* follow that, becauſe there is a recapture, therefore the loſs ceaſes to be total. If the voyage be abſolutely loſt, or not worth purſuing: If the ſalvage be very high: If further expence be neceſſary: If the inſurer will not engage, at all events, to bear that expence, though it ſhould exceed the value, or fail of ſucceſs: Under theſe, and many other like circumſtances, the inſured may diſentangle himſelf and abandon, notwithſtanding there was a recapture. The *Guidon (a)*, amongſt other inſtances of a total loſs, where the inſured may abandon, ſays, "*If the damage exceed half the value of the thing inſured; or if the voyage be loſt, or ſo interrupted that the purſuit of it is not worth the freight.*" But, in the preſent caſe, the voyage was ſo far from being loſt, that it had met with only a ſhort temporary obſtruction; the ſhip and cargo were both ſafe; the expence incurred did not amount to near half the value; and when the offer was made to abandon, the inſurer undertook to pay all charges and expences which the inſured ſhould be put to by the capture. The only argument to ſhew that the loſs had not, upon the recapture, ceaſed to be total, was built upon a miſtaken ſuppoſition, that the recaptor had a right to demand a ſale, and to put a ſtop to any further proſecution of the voyage. But that is not ſo. The property *returns* to the owner, pledged to the recaptors for the amount of the ſalvage. Upon paying this he is entitled to reſtitution (*b*). The recaptor in this caſe had no right to ſell the ſhip. If they had differed about the value, the court of admiralty would have ordered a com-

While the ſhip is in the hands of the enemy, ſhe is conſidered as totally loſt: Yet the property is not changed, but reveſts in the original owner upon a recapture.

But a recapture does not in all caſes prevent the loſs being total.

In what caſes a loſs may be ſaid to be total.

Upon a recapture the property returns to the original owner, pledged for the ſalvage.

(*a*) Ch. 7, § 1.—(*b*) Vid. 29 *G.* II. c. 34.

miſſion

miſſion of appraiſement. It was the intereſt of all parties that the ſhip ſhould forthwith proceed to *London*. Had the recaptor oppoſed it, or affected delay, the court of admiralty would have made an order for bringing her to to her port of delivery, upon reaſonable terms. Therefore it is clear that, on the 26th of *June*, the ſhip had ſuſtained no other loſs than a ſhort temporary obſtruction, and a charge which the defendant offered to pay.—As to the *laſt point*: The plaintiff's demand is for an indemnity. His action, then, muſt be founded on the nature of his damnification, as it really was, at the time of the action brought. It is repugnant, upon a contract of *indemnity*, to recover as for a total loſs, when the final event has determined that the damnification is, in truth, an average loſs. 'Whatever undoes the damnification, in whole or in part, muſt operate upon the indemnity in the ſame degree. It is a contradiction in terms to ſay that an action will lie for an indemnity, when, upon the whole event, no damage has been ſuſtained."—To illuſtrate this, he put the caſe of an action of waſte brought againſt a tenant, after he had repaired (*a*); and of an action brought by a ſurety, ſued to judgment againſt his principal, after the principal had paid the debt and coſts, and entered ſatisfaction on record; to ſhew that, by the common law, the injury being repaired before the action brought, is an anſwer to the action. He then ſaid;—"But, in the preſent caſe the notion of a veſted right in the plaintiff to ſue as for a total loſs, before the recapture, is only fictitious and not founded in truth: For the inſured is not obliged to abandon, in any caſe. He has an election. No right can veſt, as for a total loſs, till he has made that election. He cannot elect before advice is received of the loſs; and if that advice ſhews the peril to be over, and the thing inſured in ſafety, he cannot elect at all; becauſe he has no right to abandon when the thing is ſafe. Writers upon the marine law are apt to embarraſs general principles with the poſitive regulations of their own coun-

Though there has at one time been a total loſs, yet the inſured cannot abandon after the *final event* has determined it to be only a partial loſs at the time of the action brought.

By the common law, an action will not lie upon an indemnity, if before the action brought, the injury has been repaired.

There is no *veſted* right to recover as for a total loſs, till the inſured, having a right to abandon, elects to do ſo.

(*a*) Vid. Co. Lit. 53, a.

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try: But they ſeem all to agree that, if the thing be recovered before the money is paid, the inſured can only be intitled according to the final event (*a*).—In the caſe of *Spencer* v. *Franco* (*b*), though upon a *wager policy*, the loſs was held not to be total, after the return of the ſhip in ſafety; though ſhe had been ſeized, and long detained by the King of *Spain*, in a time of actual war.—In the caſe of *Pole* v. *Fitzgerald* (*c*), though upon a wager policy, the majority of the judges, and the Houſe of Lords held there was no total loſs; the ſhip having been reſtored before the end of the four months, the time for which ſhe was inſured.—The preſent attempt is the firſt that was ever made to charge the inſurer, as for a total loſs, upon an *intereſt* policy, after the thing was recovered: And it is ſaid, the judgment in *Goſs* v. *Whithers* gave riſe to it."—Here he recapitulated the grounds of the judgment in that caſe (*d*), and proceeded thus,—"But it is ſaid that though the caſe of *Goſs* v. *Whithers* was entirely different, ſome part of the *reaſoning* warranted the propoſition now inferred by the plaintiff from it. The great principle relied upon was, that, as between the inſurer and inſured, the contract being an indemnity, the *truth* of the facts ought to be regarded; and therefore there might be a total loſs by a capture, which could not operate a change of property; and a recapture ſhould not relate by fiction, like the *Roman jus poſtliminii* as if the capture had never happened, unleſs the total loſs was in truth recovered. This reaſoning proved, *è converſo*, that if the thing, *in truth* was ſafe, no artificial reaſoning ſhall be allowed to ſet up a total loſs. The words quoted at the bar were certainly uſed (*e*), "that there is no book, "antient or modern, which does not ſay that, in caſe of "the ſhip being taken, the inſured may demand as for a "total loſs, and abandon." But the propoſition was applied to the ſubject matter, and is certainly true, provided the capture, or the total loſs occaſioned thereby, *continue*

If the thing inſured be recovered before the loſs is paid, the inſured can only recover according to the final event.

If a ſhip be recovered after a long detention, it is not a total loſs, even upon a wager policy.

A paſſage in the judgment of *Goſs* v. *Whithers*, explained.

(*a*) Vid. *Roccus*, Not. 50, ſup. 490.—(*b*) Sup. 441.—(*c*) 5 Bro. Parl. Ca. 131, inf. 504.—(*d*) Sup. 487.—(*e*) Vid. ſup. 488.

to

to the time of abandoning, and bringing the action. The caſe then before the court did not make it neceſſary to ſpecify all the reſtrictions. But I will read to you *verbatim*, from my notes of the judgment then delivered, what was ſaid, to prevent any inference being drawn beyond the caſe then determined."—Here he read ſeveral paſſages from his argument in *Goſs* v. *Whithers*, which is fully ſet forth in the foregoing account of that caſe, and then proceeded; —"From this way of reaſoning it by no means followed, that if the ſhip and cargo had, by the recapture, been brought ſafe to the port of delivery, without having ſuſtained any damage at all, the inſured might abandon. But without dwelling longer upon principles or authorities, the conſequences of the preſent queſtion are deciſive. It is impoſſible that any man ſhould *deſire* to abandon, in a caſe circumſtanced like the preſent, but for one of two reaſons: Either becauſe he has *over-valued*; or becauſe the *market has fallen* below the original price. The only reaſons which can make it the intereſt of the party to *deſire* to abandon, are concluſive againſt allowing it. If the valuation be true, the plaintiff is indemnified by being paid the charge he has been put to by the capture. If he has over-valued, he will be a gainer, if he be permitted to abandon; and he can only deſire it becauſe he has over-valued. This was avowed upon the firſt argument; and that very reaſon is concluſive againſt its being allowed. The inſurer, by the marine law, ought never to pay leſs, upon a contract of indemnity than the *value* of the loſs; and the inſured ought never to receive more. Therefore, if there were occaſion to reſort to that argument, the conſequence of the determination would alone be ſufficient upon the preſent occaſion. But, upon *principles*, this action could not be maintained as for a total loſs, if the queſtion were to be judged by the ſtricteſt rules of the common law: Much leſs can it be ſupported for a total loſs, as the queſtion ought to be decided by the large principles of the marine law, according to the ſubſtantial intent of the contract, and the real truth of the fact. The property, and daily negotiations,

When the ſhip is ſafe and the voyage is not loſt, the inſured ought not to be permitted to abandon.

The inſurer ought never to pay leſs than the *value* of the loſs, nor the inſured receive more.

tiations of merchants ought not to depend upon ſubtleties and niceties; but upon rules eaſily learned and eaſily retained; becauſe they are the dictates of common ſenſe, drawn from the truth of the caſe. If the queſtion depend upon the fact, every man can judge of the nature of the loſs, before the money be paid: But, if it depend upon *ſpeculative refinements*, from the law of nations, or the *Roman jus poſtliminii*, concerning the change, or reveſting, of property; no wonder merchants are in the dark, when *doctors* have differed upon the ſubject from the beginning, and have not yet agreed.—To obviate too large an inference being drawn from this determination, I deſire it may be underſtood, that the point here determined is, *That the plaintiff upon a policy can only recover an indemnity, according to the nature of his caſe, at the time of the action brought, or, at moſt, at the time of his offer to abandon.* We give no opinion, how it would be, in caſe the ſhip and goods were reſtored in ſafety between the offer to abandon and the action brought, or between the commencement of the action and the verdict: And particularly I deſire that it may not be inferred, that in caſe the ſhip or goods ſhould be reſtored, *after the money is paid as for a total loſs*, the inſurer could compel the inſured to refund the money and take the ſhip or goods. That caſe is totally different from the preſent, and depends throughout, upon different reaſons and principles. Here, the event had fixed the loſs to be an average loſs only, before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident; conſequently before he could make an election. Therefore, under theſe circumſtances, we are of opinion that he cannot recover for a total loſs, but for an average loſs only; the amount of which is aſcertained by the jury.—The judgment muſt be entered up as for the average loſs ſtated in the caſe;" viz. 10 l. *per cent.*

Queſtions of inſurance ſhould not depend on ſubtilties, but on plain and eaſy rules the dictates of common ſenſe.

The inſured can only recover an indemnity for his loſs at the time of the action brought, or offer to abandon.

If after a total loſs has been paid, the ſhip be reſtored, the inſured ſhall not be obliged to refund.

The following caſe will ſhew that if, upon a recapture, the captain find that the voyage cannot be purſued, and, acting fairly for the benefit of all concerned, he ſell the ſhip and cargo to pay the ſalvage, and thereby put an end

If upon a recapture the captain ſell the ſhip and cargo, as being the beſt to be done for all concerned; the inſured may abandon.

to the voyage; the inſured may abandon, and recover as for a total loſs.

A ſhip and freight were inſured from *Monſerat* to *London*:—The ſhip was taken on her voyage on the 23d of *May* by two *American* privateers, who took the captain and all the crew, and part of the cargo (which conſiſted of ſugars), out of her; and alſo took away the rigging. She was afterwards retaken and carried into *New York*, where the captain arrived on the 23d of *June*, and, taking poſſeſſion of the ſhip, found that part of what had been left on board of the cargo, was waſhed overboard; that 57 hogſheads of what remained was damaged, and that the ſhip was leaky, and could not be repaired without unloading her entirely. The owners had no ſtorehouſe at *New York*. No ſailors were to be had there; and the only method he had of paying the ſalvage, was by ſale of the ſhip or part of the cargo. He did not know of the inſurance. The expence of repairing the ſhip would have exceeded the freight by more than 100 l. There was an embargo on all veſſels at *New York* till the 27th of *December*, and his ſhip ought to have arrived at *London* in *July*. Upon conſulting with his friends at *New York*, he reſolved to ſell the ſhip and cargo, as the moſt prudent ſtep for the intereſt of his employers. The cargo was accordingly ſold and paid for. The ſhip was alſo contracted for; but the perſon who agreed to buy her ran away; and the captain left her in a creek near *New York*, and returned to *England*, where he arrived in the *February* following, and informed the plaintiff of what he had done. The plaintiff immediately claimed from the underwriters as for a total loſs, and offered to abandon.—The underwriters reſiſted this claim. The inſured brought an action on the policy, and went for a total loſs. The defendant inſiſted that it was only an average loſs.—Lord *Manſfield*, who tried the cauſe, told the jury, that if they were ſatisfied *that the captain had done what was beſt for the benefit of all concerned*, they muſt find as for a total loſs. The jury found a verdict according to this direction; and upon a motion for a new trial, the court were clearly of opinion

A ſhip and goods are captured and recaptured, and put in poſſeſſion of the captain, who diſpoſes of both and puts an end to the voyage; and in ſo doing, acts to the beſt of his judgment for the benefit of all concerned: The inſured may *abandon*, and demand as for a *total loſs*.

Milles v. *Fletcher*, *Doug.* 219.

opinion that the plaintiff had a right to *abandon*, and claim as for a total loſs.—Lord *Mansfield* ſaid;—"On the trial of this cauſe, it did not appear to me that there was any queſtion of law, and no caſe was aſked for. It was impoſſible to aſk for one till the facts were aſcertained; and when aſcertained, it would have been impoſſible to ſtate them in any way which could have left a doubt on the law. It was not contended that a capture *neceſſarily* amounts to a total loſs, as between inſurer and inſured; nor, on the other hand, that, on a capture and recapture, there may not be a total loſs, though there remains ſome material tangible part of the ſhip and cargo. Neither was it contended that the captain has an arbitrary power, by his own act, to make the loſs either partial or total, as he pleaſes. The queſtion is ſimply this, whether the conſequences of the capture were ſuch as, notwithſtanding the recapture, occaſioned a *total obſtruction* of the voyage, or only a *partial ſtoppage*, as in the caſe of *Hamilton* v. *Mendez* (*a*). In that caſe, and in *Goſs* v. *Withers* (*b*), great ſtreſs was laid on the ſituation of the ſhip and cargo, at the time when the inſured *had notice*, at the time of the offer *to abandon*, and at the time of the *action brought*. No caſe ſays that the bare exiſtence of the hulk of the ſhip prevents the loſs being total. The caſes where the inſured may abandon are, "If the "voyage be loſt, or not worth purſuing;—If the ſalvage "be high;—If further expence be neceſſary;—If the "inſurer will not, at all events, undertake to pay that "expence (*c*), &c." Here, at the time of the capture, there were no hopes of a recovery; no friend's ſhip in ſight; no means of reſiſtance; all the crew taken out, and part of the cargo; and the rigging alſo taken away. When the ſhip was retaken and brought to *New York*, it ſtill continued a total loſs. Neither the inſured nor the inſurers, had any agent in the place. The court of admiralty muſt have proceeded *ſecundum æquum et bonum*, and might have ſold her for the benefit of thoſe concerned.

A capture does not neceſſarily amount to a total loſs; nor does a recapture prevent its being total.

In what caſes the inſured may abandon.

(*a*) Sup. 491.—(*b*) Sup. 486.—(*c*) Vid. ſup. 493.

When the insured first had notice and offered to abandon, and when the action was brought, it was still a total loss. The voyage was abandoned, the cargo sold, and the ship left to be sold. The only answer the defendant makes, or can make to this, is, that the loss was total, indeed, but the captain made it so by his improper conduct; for that, on his taking possession of the ship, the loss became partial, and that he ought to have pursued the voyage.

The captain has an implied authority to do the best he can for the benefit of all concerned, and the insurer is bound by his acts.

But was this defence true in fact? The captain, when he came to *New York*, had no express order, but he had an implied authority, from both sides, to do what was right and fit to be done, as none of them had agents in the place. And for the consequences of whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer; because this is within the contract of indemnity. Suppose there had been no insurance, what ought the captain to have done? 1. As to the *cargo*: According to the course of the voyage, the ship should have arrived at *London* in *July*.* On the capture, part had been taken out, some had been washed over-board, some damaged, and the whole, from the leakiness of the vessel, in a perishable state. There were no store-houses, nor could the ship proceed in the state she was in. The crew was gone, and an embargo laid on till *December*. What! shall a cargo, which was intended to arrive in *London* in *July*, be kept in a perishable state at *New York*, in a leaky vessel, till *December*. 2. As to the *ship*: It was certainly better to sell her, than to bring her to *London*. There was no crew belonging to her, and she had no cargo. Even if all the cargo had been left, the expence of repairs would have exceeded the freight. If she had been brought home, the expence of bringing her might have been more than what she would have sold for in *London*. It has been said, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy, for that circumstance goes to determine it to be the interest of the insured to abandon the voyage. The question is, what did the owner suffer by the capture; and it appears that he

suffered

ſuffered ſo much that it was not worth while to purſue the voyage. The whole voyage was loſt. As the captain did not know of the inſurance, he had no temptation to give the turn of the ſcale to the one ſide or the other. I left it to the jury to determine whether what the captain had done, was *for the benefit of the concerned*. If they had found that it was, in words, where would have been the queſtion of the law (*a*)?"

If the captain purchaſe the ſhip from the captors for account of his owners; the money paid, being in nature of ſalvage, is only a partial loſs.

So, if the ſhip be ſold by the captors, and the captain acting as agent for the owners, purchaſe the ſhip on their account; this ſhall be conſidered as a recovery of the ſhip for the owners, and the money thus paid, as ſalvage; and if the voyage can be proſecuted, this is only a partial, and not a total, loſs.

Mc Maſters v. *Shoolbred*, Eſp. Rep. 237.

Thus:—A ſhip, inſured for ſix months, was captured and carried into *Charleſtown*, where ſhe remained upwards of a month, and then was ſold by the captors, and purchaſed by the captain for account of the original owners.—In an action on the policy, the defendant paid 60l. *per cent.* into court, as for a partial loſs.—The plaintiff contended, that the ſhip having been captured and ſold by the captors, after ſhe had been a month in their poſſeſſion, this was a total loſs.—Lord *Kenyon*, who tried the cauſe, held that this was only to be conſidered as a partial loſs, and that the owners could not abandon. He conſidered the captain as agent for the owners, recovering the veſſel upon their account, and the price as a kind of ſalvage, the amount of which would be the loſs ſuſtained, and which only conſtituted an average loſs. He admitted, however, that when the ſhip had been captured, and was carried into port, in the enemy's poſſeſſion, the inſured might, at that period, have abandoned. But not having abandoned, till after the ſhip was recovered, they could now only go as for an average loſs.—The jury found a verdict according to this direction.

(*a*) In *Plantamour* v. *Staples*, ſup. 378. Mr. Juſtice *Buller* adopts this doctrine, that the inſurers are bound by the acts of the captain when he does what *he deems beſt* for the benefit of all concerned.

Having laid before the reader the authorities upon queſtions of abandonment, upon loſſes by capture, and arreſt of princes; we will now proceed to conſider,

2. Of the right of abandoning in other caſes.

Shipwreck is always conſidered as a total

Shipwreck is generally a total loſs. What may be ſaved of the ſhip or goods is ſo uncertain, and depends ſo much on accident, that the law cannot diſtinguiſh this from the abſolute deſtruction of the whole. The wreck of the ſhip may remain and may be ſaved, but the ſhip is loſt. A thing is ſaid to be deſtroyed when it is ſo broken, disjointed, or otherwiſe injured, that it no longer exiſts in its original nature and eſſence. So the goods may remain; but if no ſhip can be procured in a reaſonable time, to carry them to their place of deſtination, the voyage is loſt, and the adventure fruſtrated.

But a ſtranding is not, of itſelf, deemed a total loſs.

But the mere *ſtranding* of the ſhip is not, of itſelf, deemed a total loſs, ſo as to entitle the inſured immediately to abandon. If by ſome fortunate accident, by the exertions of the crew, or by any borrowed aſſiſtance, the ſhip be got off and rendered capable of continuing her voyage, it is not a total loſs, and the inſurers are only liable for the expences occaſioned by the ſtranding. It is only where the ſtranding is followed by *ſhipwreck*, or in any other way renders the ſhip incapable of proſecuting her voyage, that the inſured is entitled to abandon (*a*).

No partial loſs, however great, can be turned into a total loſs.

It is a rule that, to entitle the inſured to abandon, there muſt have been, at ſome period of the voyage inſured, or during the continuance of the riſk, a total loſs; and the following caſes will ſhew that no partial loſs, however great, occaſioned by the perils of the ſea, can be turned into a total loſs.

A ſhip performed her voyage, but was ſo damaged as not to be worth repairing; yet, as the damage was only

An inſurance was made on the ſhip *Friendſhip*, from *Wyburgh* to *Lynn*.—In an action on the policy, the defendant pleaded a tender of 48 l.—The plaintiff claimed as for a total loſs, and upon the trial of the cauſe, it appeared

(*a*) Vid. *Emerig.* tom. 2, p. 180.

that

that the ſhip had ſuffered ſo much in her voyage, that when ſhe arrived at *Lynn*, ſhe was not worth repairing. The damage, however, ſuſtained by the ſhip, did not exceed 48 *per cent.*, the ſum which the defendant had paid into court upon his plea of tender.—Upon this caſe the defendant inſiſted that this was a *partial* and not a total loſs, and that therefore the plaintiff had no right to abandon.—The court were clearly of opinion that the owner cannot abandon, but in the caſe of a total loſs, and that they could not determine that there had been a *total loſs*, when the jury found that there was only a loſs of 48 l. *per cent.*—Mr. Juſtice *Aſhurſt* ſaid,—It will be making the inſurers anſwerable for the goodneſs of the ſhip, if they are held liable for more than 48 *per cent.* It is ſtated that the ſhip was not worth repairing; but *non conſtat* that, if the ſhip had not received any damage during the voyage, ſhe would have been worth repairing: And though ſhe was not in a ſound ſtate, yet ſhe had been 24 hours in ſafety; and the jury having aſcertained the amount of the damage ſhe has ſuſtained, I cannot ſay that the plaintiff ought to recover more."—Mr. Juſtice *Buller* ſaid,—"Nothing can be better eſtabliſhed than that the *owner* of a ſhip can only abandon in the caſe of a total loſs happening *at ſome period or other of the voyage*; which can not have happened in this caſe, as the jury have expreſsly found that the loſs amounted to 48 l. *per cent.* In the caſe of *Jenkins* v. *Mackenzie*, though the ſhip was brought into port, yet the capture, *as between the inſurer and the inſured*, was a total loſs. The true way of conſidering this caſe is, that it was an inſurance *on the ſhip, for the voyage*; and if either the ſhip or the voyage be loſt, it will be a total loſs; but here neither was loſt. The caſe of *Hamilton* v. *Mendez* (*a*) is deciſive."

eſtimated at 48 *per cent.* this is not a total loſs, and the inſured cannot abandon.

Cazalet v. *St. Barbe*, 1 T. R. 187.

If a ſhip in her voyage receives great damage, but arrive at her port of deſtination, and remain 24 hours in ſafety; this cannot be a total loſs.

So, where the ſhip *Prince of Wales* was inſured, "in port or at ſea, for ſix months from the 18th of *July* 1777."—The ſhip was in government ſervice bound from *Cork* to *Quebec*. She arrived there; but the ſeaſon being ſo far advanced before ſhe was ready to return, ſhe was

A ſhip, inſured for ſix months, receives a great injury within the time; and the captain, being unable to get her repaired, ſells her, *after the time*: This is not a total,

(*a*) Sup. 491.

But a partial loſs; the ſhip being only *damaged*, not *loſt*.

Furneaux v. *Bradley*, B. R. Eaſt, 20 G. III. *Park*, 166.

removed into the baſon; from whence on the 19th of *November* ſhe was driven by a field of ice, and damaged by running on the rocks. Her condition could not be examined into, till the *April* following, after the expiration of the policy. She was then found to be bulged, and much injured, but not irreparably ſo. In the progreſs of the repair, diffiulties aroſe for want of materials; and the captain, after conſulting the merchants and agent in the place, ſold her. An account was made up chargeing the inſurers with the whole amount, and crediting them for the money for which the ſhip was ſold, as ſalvage.—Lord *Mansfield*, at the trial, ſaid, "The great point in the caſe is, whether this be a total loſs by this accident. It is a new queſtion, upon which I ſhall reſerve a caſe for the opinion of the court."—A caſe being reſerved, the court, after argument, were of opinion that the ſhip ſhould be conſidered as *damaged*, on the 19th of *November*, but not *totally loſt*.—Lord *Mansfield* ſaid, the juſtice of the caſe ſeemed to be that the loſs in *November* ſhould be taken as an *average*, not as a *total* loſs.

A privateer, inſured for four months *free from average*, is forced into port by a mutiny of the crew, but is in ſafety at her port after the four months are expired: The inſured can recover for no loſs—not for an average loſs, becauſe the inſurance was *free from average*; and not for a *total loſs*, becauſe it was only an average loſs.

Fitzgerald v. *Pole*, 5 Bro. Parl. Ca. 231, *Willes*, 641.

So, where the *Good Fellow* privateer was inſured, "At "and from *Jamaica* on a cruiſe for four months, valued "at 1000 l. *without farther account and free from average.*" —Upon a ſpecial verdict it appeared, that while the privateer was on her cruiſe, and within the four months, the crew mutinied againſt the captain and his officers, and by force carried the ſhip to *Jamaica*; and before her arrival there, by force, ſeized the boat, fire arms, and cutlaſſes, carried them off and deſerted the ſhip; whereby the voyage and cruiſe were prevented and loſt for the remainder of the four months: That the ſhip arrived at *Jamaica*, but not till after the end of the four months.—Upon this caſe the King's Bench gave judgment for the plaintiff.—Upon a writ of error, the Exchequer Chamber unanimouſly reverſed that judgment, and the Houſe of Lords confirmed the judgment of reverſal; being of opinion, with the majority of the judges, that the inſurer, being, by the terms of the policy, free from all average, the plaintiff could not be entitled to recover but in caſe of a total

total loſs; and the ſhip being found, by the ſpecial verdict to be in good ſafety, at her proper port, at and after the end of the four months, for which the inſurance was made, there could be no loſs (*a*).

If, by any accident or misfortune, the ſhip be prevented from proceeding on her voyage, and the voyage be thereby loſt; this is a total loſs, not only of the ſhip and freight, but alſo of the cargo, if no other ſhip can be procured to carry it to its port of deſtination.

But if the voyage be loſt, from whatever cauſe, it is a total loſs.

Thus:—An inſurance was made on the ſhip *Grace*, her cargo and freight, "At and from *Tortola* to *London*; "warranted to depart on before the 1ſt of *Auguſt* 1781. "The ſhip valued at 2,470 l. the cargo at 12,400 l. "and the freight at 2,250 l.; at 25 guineas *per cent.* "to return 10 *per cent.* if ſhe departed with convoy "from the *Weſt Indies*, and arrived; *the ſhip, freight,* "*and goods warranted free of particular average.*"—The ſhip and cargo had been a *Dutch* prize, condemned at *Tortola*; but during four or five months that ſhe ſtaid there, was never unloaded. On the 1ſt of *Auguſt* the whole fleet of merchantmen, with their convoy, got under weigh; but not being able to get clear of the iſlands that day, they came to an anchor during the night, and the next day cleared the iſlands. About ten o'clock that day, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain and make water ſo faſt, that the pumps were obliged to be worked; and on the 3d the captain made a ſignal of diſtreſs, in conſequence of which ſhe was obliged to return to *Tortola*. On her arrival there, the captain made his proteſt; and a ſurvey was had, by

On a voyage from *Tortola* to *London*, the ſhip by ſea damage is obliged to put back on the third day, and can not be repaired there, and no other ſhip can be got for the cargo: This is a total loſs of the ſhip, freight, and cargo; and the inſured may abandon.

Manning v. *Newnham*, B. R. Tr. 22 *G.* III. MS. S. C. *Park*, 169.

(*a*) It has been ſaid (*Park*, 170.) that caſes like the preſent can never ariſe again, becauſe it originated in a wager policy, which is prohibited by law. The policy, in this caſe, can ſcarcely be ſaid to have been a wager policy; it was rather a valued policy, free from averages. But it muſt be recollected that there is, in the ſtatute 19 *G.* II. c. 37, a proviſo to exempt privateers from the operation of the firſt clauſe, which prohibits inſurances intereſt or no intereſt; and therefore the policy in this caſe would be a good and valid policy at this day.

which

which the ſhip was declared unable to proceed to ſea with her cargo, upon a *London* voyage, and that ſhe could not be repaired in any of the *Engliſh* iſlands in the *Weſt Indies*. There was no evidence of any ſpecial damage to the cargo, which was ſold for within 700 l. of the value. The owners purchaſed two-thirds of it; the greateſt part of which might have been ſent home and ſold at a great profit. The inſured claimed as for a total loſs on the ſhip, cargo, and freight. At the trial, though the cargo was warranted free from average, yet it ſeemed dangerous to permit the inſured to abandon, and thus turn an average into a total loſs. The jury, however, thought the inſured entitled to what he claimed, and found accordingly.—Upon a motion for a new trial, the court, upon full conſideration, were of opinion that the verdict was right and ought to ſtand.—Lord *Mansfield* ſaid,—"At the trial, my prejudices were in favour of the underwriters; but upon better conſideration, I agree with the reſt of the court that the jury did right. *If, by the perils inſured againſt, the voyage be loſt and gone, it is a total loſs, otherwiſe not.* The ſhip received an irreparable hurt within the policy, which drove her back to *Tortola*, where only two ſhips could be had, both together not capable of taking the whole of the cargo on board. The voyage was ſo completely loſt, that no ſhip could be got; and the inſured was unable to ſend that part of the goods which they had purchaſed, forward to *England*; and yet no body bought but to ſend to *England*. If the voyage could have been continued in another ſhip, there might have been freight *pro rata*. But it was admitted that there was a total loſs on the freight, becauſe the ſhip could not perform her voyage; and the inſured were not to wait till ſhips could be had. The ſame argument applies to the ſhip and cargo. This is a contract of indemnity, and the inſurance is that the ſhip ſhall come to *London*. Introducing nice diſtinctions is inconvenient and dangerous: Upon turning this caſe in every view, the court are of opinion that the voyage was totally loſt; and this is the ground of our determination."

If a cargo be damaged in the courſe of the voyage, and it appear that what has been ſaved is leſs in value than the amount of the freight; this is clearly a total loſs. This doctrine is warranted not only by the paſſage from *Le Guidon* which has been already cited, but alſo by the opinion of Lord *Mansfield* in the caſe of *Goſs* v. *Withers* (*a*), and by that of Lord *Hardwicke* in the following caſe.

If a cargo be damaged ſo as to be reduced in value to leſs than the freight, it will be a total loſs.

An action was brought on a policy of inſurance upon corn for 200 l. but of the value of 217 l., the defendant having ſuffered judgment to go by default, upon the execution of a writ of enquiry, before Lord *Hardwicke*, it appearing that the corn being damaged, was ſold for only 67 l., and the freight came to 80 l.—Upon this, the queſtion was, whether, as the freight exceeded the ſalvage, this was not to be conſidered as a total loſs. For the plaintiff it was inſiſted that he ought not to be in a worſe ſituation than if his corn had gone to the bottom; for then he would have had no freight to pay; but now, that the voyage has been performed, whereby freight is become due, he has a right to apply the ſalvage to diſcharge it. It was proved to be the uſage that, where the ſalvage exceeds the freight, to deduct the freight out of the ſalvage, and make up the loſs upon the difference.—For the defendant it was inſiſted that, as his inſurance was upon the corn, and the whole did not periſh, he ought, in making up the loſs, to deduct the ſalvage: But no inſtance could be ſhewn, on either ſide, of an adjuſtment where the freight exceeded the ſalvage.—The Chief Juſtice was of opinion that, within the reaſon of deducting the freight, where the ſalvage exceeds it, the plaintiff, in this caſe, where it fell ſhort, was intitled to have it conſidered as a total loſs. The jury found according to this direction (*b*).

Boyfield v. *Brown*, at N. P. 2 Str. 1065.

In

(*a*) Vid. ſup. 486.—(*b*) This caſe was before the year 1749, when the common memorandum was introduced into policies, that corn, &c. ſhould be free from average, unleſs general, or the

When the inſured may abandon by the law of *France*.

In *France* the diſtinction is this: In caſe of ſhipwreck, the inſured may abandon, though the goods be recovered and carried to their place of deſtination, becauſe goods thus ſaved are generally in a bad and unmarketable condition. But if the ſhip become innavigable, the inſured cannot abandon the goods, if by any other ſhip they may be conveyed in time to their place of deſtination (*a*).

Sect. 2.

Within what Time the Inſured may abandon.

Some time ſhould be fixed when the degree of reſponſibility of the inſurer's reſponſibility ſhould be aſcertained.

It ſeems reaſonable and neceſſary that ſome time ſhould be fixed when the degree of reſponſibility of the underwriter ſhould be aſcertained; and therefore in ſeveral maritime ſtates on the continent, poſitive regulations have been eſtabliſhed, limiting the time, after a loſs has happened, within which the inſured may abandon. In *France*, *Spain*, and *Holland*, the times are limited by law, according to the diſtance of the place where the loſs happens, within which the abandonment muſt be made (*b*).

In *England*, the inſured, as ſoon as he is informed of a total loſs, muſt elect to abandon or not. If he mean to do ſo, he muſt give reaſonable notice to the inſurers; otherwiſe he will wave his right to abandon.

But the times thus limited muſt often prove either too long or too ſhort, and frequently occaſion great loſs and inconvenience either to the inſured or the inſurer. In *England* we have no ſuch poſitive regulation, nor any time limited by law for abandoning: Our courts have laid down a rule, which ſeems better ſuited to the practice of commerce, and more likely to prevent frauds than thoſe we have juſt alluded to. This rule is, that as ſoon as the inſured receives advice of a total loſs, he muſt make his election whether he will abandon or not: If he determines to abandon, he muſt give the underwriters notice of this *within a reaſonable time* after the intelli-

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the ſhip be ſtranded. Vid. *Maſon* v. *Scurray*, ſup. 143, where in a ſimilar caſe, Lord *Mansfield* held it to be but a partial loſs, for which, as that caſe was upon a policy with the common memorandum, the inſurer was not liable.

(*a*) *Emerig.* tom. 2, p. 187, 188.—(*b*) Vid. Ord. de la mar. l. t. art. 48, 49; 2 *Mag.* 416.

gence

gence arrives; and any unneceſſary delay in giving this notice will amount to a waver of his right to abandon; for unleſs the owner does ſome act, ſignifying his intention to abandon, it will be only a partial loſs, whatever may be the nature of the caſe, or the extent of the damage (*a*). This rule, which has been long eſtabliſhed, is analogous to the general principle of the common law, which requires that all notices of acts affecting the intereſts of third perſons ſhall be given *within a reaſonable time.* In the following caſe this doctrine was firſt explicitly laid down by the court of King's Bench.

An inſurance was made on goods "from *Jamaica* to "*London.*"—The ſhip was captured by an *American* privateer; and in a few days afterwards the captor, having ſtripped her of her ſtores and part of her rigging, and having taken out ſome of her hands, ſet her at liberty. There was a clauſe in the policy to exempt the underwriters from average loſſes under 3 *per cent:* And the part of her cargo taken out did not amount to that ſum. In conſequence of the ſhip's loſing a part of her crew, it became impoſſible for her to purſue her voyage, and ſhe was obliged to bear away for *Charleſtown*, where ſhe was put into the hands of one *Cruden*, a part-owner, who ſold the cargo, but remitted none of the money home. In his books, he gave the *underwriters* credit for the amount. At the time of the ſale, he was in bad circumſtances, and afterwards became inſolvent. It appeared, however, that the other owners looked to *Cruden* for two or three years for payment; during all which time, no notice of abandoning was given by the inſured to the underwriters. In an action on the policy, the defendant paid a ſum of money into court being the amount of the average loſs.—Two queſtions were made at the trial: *Firſt*, whether the plaintiffs were intitled to recover as for a *total loſs.* Upon this, Mr. Juſtice *Buller*, who tried the cauſe, was of opinion that, as there had been a capture, which, for a time, had occaſioned a total loſs, the owners had an option to abandon, or not as they pleaſed;

A ſhip being taken, the captor takes out her ſtores and part of her crew, and ſets her at liberty: This obliging her to return into the neareſt port, her voyage is loſt, and her cargo, which is inſured, is ſold by an agent, who becomes inſolvent.—After 3 years, in which the inſured adopts the acts of the agent, he ſhall not be at liberty to abandon, and throw the loſs occaſioned by the failure of the agent on the underwriters. He might have abandoned, but he ought to have done ſo immediately on receiving intelligence of the loſs. Not having done ſo, he gives credit to the agent.

Mitchell v. *Edie*, 1 T. R. 608.

(*a*) Per *Buller*, J. 1 T. R. 616.

pleaſed: But, if they had choſen to abandon, they ought to have done it immediately, upon receiving intelligence of the loſs; and, as they had not done ſo, but had looked to *Gruden*, as their agent, for payment, they had waived their right to abandon, and could only recover as for a *partial loſs*. The ſecond queſtion aroſe out of the particular circumſtances of the caſe, not properly belonging to this branch of the ſubject, and, indeed, of no general importance. The jury found a verdict for the defendant.—Upon a motion for a new trial, the court (*a*) were clearly of opinion that the plaintiff was not intitled to recover.—Mr. Juſtice *Aſhurſt* ſaid;—"The general rule is, that where any part of the property inſured has been ſaved, the inſured cannot recover as for a total loſs, unleſs he make his election to abandon, and give reaſonable notice to the underwriters of his intention. But it is contended that the inſured never wave their right to abandon while they are managing in the beſt manner they can for the benefit of all concerned: And that argument is grounded on the common clauſe inſerted in every policy, whereby the inſured is authoriſed, "to ſue, labour and travail, in and about the defence, "ſafeguard, and recovery of the goods, &c.: without "prejudice to the inſurance." Now this clauſe does not warrant the poſition to the extent contended for. The meaning of it is, that, till the inſured have been informed of what has happened, and have had an opportunity of exerciſing their own judgment, no act done by the maſter ſhall prejudice their right of abandoning: And this is reaſonable, becauſe the loſs may happen at a great diſtance, ſo that the inſured cannot exerciſe their judgment immediately: It is therefore neceſſary that the maſter, who is on the ſpot, ſhould do the beſt he can. But the inſured are bound to decide, and ſignify their election to the underwriters the firſt opportunity; for though the perſon who takes upon him to act on the occaſion for the benefit of all concerned, is not the agent of the inſured, yet if, upon receiving no-

The meaning of the clauſe in the policy which enables the inſured to labour for the recovery of the goods without prejudice to the inſurance.

The inſured is bound to decide and give notice of his deciſion the firſt opportunity.

(*a*) Mr. Juſtice *Aſhurſt* and Mr. Juſtice *Buller*.

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tice of the loſs, they do not elect to abandon, they adopt the acts of ſuch perſon, and make him their agent. This is ſomething like the notice that is to be given to the drawer of a bill of exchange, in caſe of non-payment, which, if the holder omit to do, he is conſidered as giving credit to the acceptor, and therefore the loſs, if any, muſt fall on him. There may be caſes where the acts of the captain may not make him the agent of either party; and then he only acts in common for them both, till notice is received by the parties at home. If, after ſuch notice, he is continued in the agency, he becomes the agent of the party by whom he is ſo confirmed: But he cannot be conſidered as the agent of the underwriters, till notice has been given to them, and they have had an opportunity of exerciſing their diſcretion, whether they will or will not continue him; though, till notice of the loſs was firſt received by the inſured, the property continued at the riſk of the underwriters. Here, *Cruden* for near three years was conſidered by the inſured as their agent; credit was given to him in that character; frequent applications were made to him for payment; and, till his inſolvency, there was no appearance of any intention to diſown him: That was the firſt moment when the inſured thought of abandoning.—Mr. Juſtice *Buller* ſaid;—"It is true that the inſured are not *bound* to abandon: On the contrary, all the caſes have ſaid that where they are intitled to abandon, they have the option to do ſo or not; but unleſs they do elect to abandon, it is only an average loſs.—The only point to be conſidered is, whether this doctrine will be productive of any uncertainty: If it would, that would be a ſufficient reaſon, in a new caſe, for not adopting it. But, in my opinion, a contrary deciſion would be productive of infinite uncertainty; for it would leave open a very vague queſtion, namely, what time the inſured ſhould be allowed to abandon. If it can extend to three years, there is no reaſon why it ſhould not extend to a much longer period: But no uncertainty can follow from this determination: for our opinion is, that when the account of a loſs has reached the inſured, they muſt make their election

If he neglect this, he adopts the acts of the agent.

If the captain be continued in the management after ſuch notice to the underwriters, he becomes their agent.

election whether they will abandon or not: If they do, they muſt give notice of their intention, to the underwriters, within a reaſonable time. If they act otherwiſe, they cannot be permitted, at any ſubſequent period to change a partial into a total loſs."

In the following caſe the above principles were adopted and enforced by Lord *Kenyon*; and, indeed, they have ever ſince been received and acted upon as clear law.

A recaptured ſhip is carried into a diſtant port, and there ſold for the benefit of all concerned, and the inſured give directions to the agent to have the proceeds remitted to them, but afterwards, and four months after they had notice of the loſs, they give notice of abandonment. —This is too late.

Allwood v. *Henkell*, at N. P. B. R. after Mich. 1795. *Park* 172.

Goods were inſured, "At and from *London* to *Jamaica*." —The ſhip was taken by a *French* privateer within a few leagues of *Jamaica*. Part of the property inſured was taken out of the ſhip. The captain, boatſwain, and all but ſeven men, were alſo taken out of her. In a fortnight after, as the captors were proceeding to *America*, the ſhip, with the remainder of her cargo, was retaken by an *Engliſh* frigate, and ſent into *Antigua*; and both were ſold there under a decree of the vice-admiralty court, by a prize agent, who received the proceeds to be paid over to the concerned, deducting one eighth for ſalvage, according to the late prize act (*a*). The capture and recapture were entered at *Lloyd*'s on the 15th of *February* 1795; but it was not known whither the ſhip was carried till the 30th of *March*, when a letter was received at *Lloyd*'s, addreſſed to the owners, freighters, and underwriters, from the judge of the vice-admiralty court at *Antigua*, informing them of the arrival of the ſhip, and of the ſale of the ſhip and cargo, under a decree of the court; and deſiring to have ſome agent appointed to remit the proceeds to *England*. Powers of attorney were ſent out in *April* by the inſured, for this purpoſe; with orders to remit the proceeds to the banking-houſe of *Smith*, *Payne* and *Smith*, one of whom was agent to the inſured. —It was objected on the part of the defendant, that although the inſured as well as the *inſurers* were informed of the loſs in the beginning of *April*; yet the inſured did not abandon till *Auguſt*, near four months after the power of attorney had been ſent out to *Antigua*. To this it was anſwered that, the property having been abſolutely

(*a*) 33 *G.* III. c. 66.

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ſold, and converted into money, before the inſured knew where the ſhip was taken to; the loſs was total in its nature, and therefore there was no occaſion to abandon.—Lord *Kenyon*, who tried the cauſe, inclined to think that an abandonment was neceſſary, and that the caſe was the ſame as if the property had not been ſold, but remained in *ſpecie* at *Antigua*. But he gave no decided opinion on this point. He ſaid the inſured were not bound to abandon in any caſe; and might, in caſe the ſales had been very advantageous, have taken the benefit of them, in the ſame manner as they might have returned the property, if it had remained in ſpecie. But the inſured muſt make his election ſpeedily, whether he will abandon or not, and put the underwriter in a ſituation to do what is neceſſary for the preſervation of the property, whether ſold or unſold: "He cannot," ſaid his lordſhip, "lie by, and treat the loſs as an average loſs, and take meaſures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them."—There was a verdict for the plaintiff only for an average loſs.

The inſured muſt make his election ſpeedily.

He cannot treat the loſs as a partial loſs, and then abandon.

So, if a ſhip be inſured for part of her value, and being captured, the inſured demand as for a total loſs, which the underwriters are willing to pay, on having an aſſignment of *one fourth* part of the ſhip from the owner, by way of abandonment; but the inſured refuſe this, becauſe the one fourth of the ſhip is of greater value than the ſum inſured; and the inſured inſtead of abandoning, repurchaſe the ſhip from the enemy:—In this caſe, he is not entitled to recover as for a total loſs, not having abandoned; nor can he recover the ſum paid for the repurchaſe of the ſhip, that being an illegal contract, and not only a trading with the enemy, but alſo a ranſom, within the meaning of the ranſom acts. This will be found determined in the following caſe.

If the underwriters demand an abandonment of more than they have inſured, this need not prevent the inſured from abandoning to the amount of the ſum inſured: But if he neglect this, he ſhall not afterwards recover as for a total loſs.

The ſhip *Themis* was inſured for twelve months, and ſailed on the 4th of *April* 1797, on a voyage from *Shields* to *Riga*; was captured on the 7th of *April* by a *French* privateer,

A *Britiſh* ſhip is captured, and carried into a neutral port, and there condemned by the enemy's.

conſul: If the inſured do not abandon, but repurchaſe the ſhip ſold under the ſentence, he ſhall not recover as for a total loſs; the property never having been out of him by the condemnation; nor ſhall he recover the ſum paid for the repurchaſe, that being a ranſom, and illegal.

Havelock v. *Rockwood*, 8 T. R. 268. Vid. ſup. 289.

privateer, and carried into *Bergen* in *Norway*, where, on the 17th of *April*, ſhe was condemned by a ſentence of the *French Conſul* there.—News of this being brought to *England* by the captain, the plaintiff demanded a total loſs from the underwriters, on which he received a letter from their broker, informing him that they were ready to ſettle with him, he firſt making an aſſignment of *one fourth* part of the ſhip to the broker for their benefit; and that, if the plaintiff had any thoughts of repurchaſing the ſhip, the underwriters would have no objection to pay their *quota* of the price.—The ſum inſured not amounting to one fourth of the value of the ſhip, the plaintiff declined making the aſſignment.—There were frequent inſtances of this ſort of condemnation in the port of *Bergen* during this war, which were made with the knowledge of the *Daniſh* government, who received duties thereon, and on the ſales in conſequence of them. On the 13th of *July* 1798, the ſhip was ſold by public auction, by the officer appointed by the court of *Denmark* for ſuch ſales, and was purchaſed for the plaintiff, by his agent at *Bergen*, for the ſum of 16281. 8s. 4d., which was her fair value. The ſhip, being then repaired, inſtead of proceeding to *Riga*, ſailed to *Peterſburgh*, and afterwards returned to *England*.—In an action upon this policy, the defendant paid 301. 11s. 3d. *per cent.* into court, and upon the trial there was a verdict for the plaintiff as for a *total loſs*, ſubject to the opinion of the court on a caſe which ſtated the above facts.—The queſtions for the opinion of the court were, 1ſt, Whether the plaintiff was entitled to recover as for a total loſs, or only for a partial loſs. 2dly, If for a partial loſs only, then, whether the ſum paid for the purchaſe was to be included, in which caſe a nonſuit was to be entered.—It was contended on the part of the plaintiff, that he was entitled to recover as for a total loſs, on the ground that the ſhip was captured by an enemy, and condemned by a court of competent juriſdiction: But the court expreſſing a decided opinion that no *French* court of admiralty could legally be holden in *Denmark*, adopting the deciſion

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in our court of admiralty, reſpecting the ſhip *Flad Oyen* (*a*); that point was abandoned as untenable.—It was then inſiſted, 1ſt. That when the ſhip was captured, the plaintiff had a right to abandon, and did in fact abandon; and 2dly, That at leaſt the plaintiff was entitled to recover as for a partial loſs, in which was to be included the ſum paid for the repurchaſe of the ſhip.—On the part of the defendant it was anſwered, 1ſt. That whatever right the inſured might have had to abandon at one time, he ought to have made his election to do ſo, immediately after the capture; but he refuſed to transfer his right to the inſurer, and therefore he could not ſay that he was ready to abandon; 2dly. That if this was only a partial loſs, the price paid for the repurchaſe of the ſhip ought not to be included in it, that being a void contract, not only by the ranſom acts, 2 *G.* III. c. 25, and 35 *G.* III. c. 66, § 37, 38, 39, but alſo by the common law, on the ground of its being a trading with the enemy.—The court determined that the plaintiff was not entitled to recover on either of the grounds upon which he attempted to ſupport his caſe.—They declined giving any opinion on the queſtion, whether the contract at *Bergen* was void, on the ground of its being a *trading with the enemy*, as that queſtion would ſhortly come before the court upon a writ of error, in the caſe of *Potts* v. *Bell* (*b*). The only qneſtion then remaining was that relative to the ranſom. Upon this, they were clearly of opinion, that the tranſaction above ſtated amounted to a ranſom; that the money paid by the plaintiff to regain the poſſeſſion of his ſhip was illegally paid; and conſequently that it could not conſtitute a charge on the underwriter.

But if, by any interference of the underwriters, the inſured be actually prevented from abandoning, the un-

But if the inſurers in any manner prevent the abandonment, they ſhall pay the whole loſs, to the amount of the ſum inſured.

(*a*) Vid. ſup. 289—(*b*) In that caſe it has ſince been determined, upon great conſideration, that any trading by a *Britiſh* ſubject with the enemy, without the King's licence, is illegal, and that a policy on goods bought from the enemy is void. Vid. ſup. 73.

derwriters are liable for all the loſs ſuſtained by the inſured to the extent of the ſum inſured.

A total loſs having happened, the inſured propoſes to abandon, but is diſſuaded from it by the underwriters, who order the ſhip to be repaired, but afterwards refuſe to pay for the repairs, and the ſhip is, on this account, obliged to be ſold: The inſurers are liable for all the loſs ſuſtained, to the amount of the ſum inſured.

Da Coſta v. *Newnham*, 2 T. R. 407.

As, where a ſhip was inſured "from *Leghorn* to *London*, with liberty to touch at *Nice*." The ſhip met with an accident in the courſe of her voyage, and was obliged to put into *Nice* to repair. Advice of this was tranſmitted to the owner, and they were informed that it would be neceſſary to unload, by which a conſiderable expence muſt be incurred. This he communicated to the underwriters, and expreſſed a deſire to abandon. Some altercation aroſe; they inſiſting on the veſſel's being repaired, and telling him to pay the bills. He at laſt conſented to this; but refuſed to advance any money; in conſequence of which it became neceſſary to take up a large ſum of money on bottomry. The ſhip was refitted and reſumed her voyage, and gained freight afterwards. Upon her arrival at *London*, application was made to the underwriters, to take up the bottomry bond, which they refuſed, and the veſſel was obliged to be ſold, to ſatisfy that debt, ſo that ſhe never was in the poſſeſſion of the inſured again. There was due upon the bottomry bond 678 l., and the ſhip ſold for 630 l.—Under theſe circumſtances, Mr. Juſtice *Buller*, who tried the cauſe, was of opinion, and it was ſo agreed at the trial and not afterwards diſputed, that there had not been a total loſs at *Nice*; for though the plaintiff offered, and was intitled, to abandon, yet, in truth, he had not abandoned. This therefore was conſidered only as an average loſs.—But Mr. Juſtice *Buller*, at the trial, and the court afterwards, determined, that the underwriters were anſwerable for all the injury that had accrued to the owner in conſequence of their interference, and directions, and their ſubſequent refuſal to diſcharge the bottomry bond: That, in conſequence of this, the ſhip never came free to the owners hands, but was obliged to be ſold, and therefore the underwriters were liable to the amount of the inſurance.

If the ſhip be not heard of in a reaſonable time,

In a former chapter it was ſhewn that if no intelligence be received of a ſhip within a reaſonable time,

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it ſhall be preſumed that ſhe foundered at ſea (*a*). When the time has elapſed which affords that preſumption, the inſured may abandon, and claim as for a total loſs.

the inſured may abandon.

Sect. 3.

Of the Form of the Abandonment.

IN the preceding ſection we have ſeen that, as ſoon as the inſured is informed of a total loſs, he muſt make his election whether he will abandon or not. If he determine to abandon, and demand as for a total loſs, he is not obliged, as in ſome foreign countries, to make a formal proteſt (*b*), but merely to give notice of the loſs to the underwriters, and of his determination to abandon.

Notice of abandonment.

It is ſingular, however, that an abandonment is not made in any particular form, or accompanied by any of thoſe ſolemnities which ſuch an important act would ſeem to require. But in whatever form an abandonment is declared, it muſt be explicit, and is not to be taken as matter of inference from an equivocal act.

There is no particular form of an abandonment. But it muſt be explicit.

Therefore, where a letter from the inſured, ſtating that the ſhip had been forced on ſhore, and a quantity of ſugars damaged, was ſhewn by the broker to the underwriters; and they, by way of anſwer, deſired, "that the inſured would do the beſt they could with the injured property;"—in an action on the policy, it was inſiſted that this letter amounted to an abandonment, and that the anſwer of the underwriters was an aſſent to it.—But Lord *Kenyon*, who tried the cauſe, ſaid, that as this was but a partial loſs, the inſured could not, by their own act, turn it into a total one. That it was the intereſt of the underwriters, and the duty of the inſured, to make a partial loſs as

The inſured informs the underwriters that the ſhip has been ſtranded, and the goods damaged, and the underwriters deſire the inſured to do the beſt they can with the goods; this will not turn a partial into a total loſs.

Thelluſon v. *Fletcher*, Eſp. Rep. 72, ſup. 105.

(*a*) Vid. ſup. ch. 13, § 1. p. 416. *Emerig.* tom. 2, p. 181.—(*b*) Vid. *Pothier*, h. t. n. 126. *Emerig.* tom. 2, p. 190.

light as poſſible; and that this was the meaning and import of the letter, and of the anſwer of the underwriters.

There muſt be ſome notice, if the inſured means to abandon.

This notice of abandonment may be given, either to the underwriter himſelf, or to the agent who has ſubſcribed for him. And this is neceſſary though the ſhip and cargo were ſold and converted into money before the notice of the loſs was received *(a)*.

If the inſurance be entire, the inſured cannot abandon for part only.

In general, the abandonment ought to be made for the whole of the effects inſured, and not for a particular part; as if part be rotten, the inſured cannot abandon that part only and retain the reſt, but he muſt abandon the whole or nothing; for the contract being entire, cannot be ſevered *(b)*.

Thus, if I have divers ſorts of goods on board a ſhip; as ſugars, indigo, and cotton; and I inſure 1000 l. on the whole, without any diſtinction; this inſurance is entire, and I cannot abandon my ſugars, and retain my indigo and cotton *(c)*.

But if different articles be ſeparately inſured or ſeparately valued, any one of them may be abandoned.

But if I inſure theſe articles by different policies; or if, in the ſame policy, they be ſeparately valued; I may abandon any one article and retain the reſt; becauſe theſe are, in effect, diſtinct inſurances, though in the ſame policy *(d)*.

So, if an inſurance be made on a ſhip and cargo diſtinguiſhing how much for the one, and how much for the other; and the ſhip in the courſe of the voyage be condemned as incapable of proceeding further; the inſured may abandon for the ſhip, and not for the cargo *(e)*. But if I inſure the ſhip and cargo *for one entire ſum*, and the ſhip be ſtranded, I cannot retain the goods, and abandon the ſhip *(f)*.

The abandonment muſt be unconditional.

It muſt be ſimple and unconditional; otherwiſe it will not transfer the entire property to the inſurers, which

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(a) *Hodgſon* v. *Blackiſton*, at N. P. after Hil. 38 G. III. *Park* 172.—*(b)* Vid. *Valin* on art. 47, h. t. p. 102.—*(c)* *Valin* ubi ſup. *Pothier*, h. t. n. 131.—*(d)* *Valin* ut ſup. *Pothier* n. 132.—*(e)* *Emerig.* tom. 2, p. 215.—*(f)* *Emerig.* tom. 2, p. 215.

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is of the eſſence of the abandonment. If therefore I abandon a captured ſhip, on condition that in caſe ſhe ſhall be releaſed, ſhe ſhall continue my property, and I ſhall repay with intereſt the ſum which the inſurers ſhall have paid me, ſuch an abandonment would be void *(a)*.

Sect. 4.

Of the Effect of an Abandonment.

The abandonment transfers the property ſaved to the inſurers in proportion to their reſpective ſubſcriptions.

BY the abandonment the inſured, as we have already obſerved, yields up to the inſurers, all his right, title, and intereſt in the ſhip or goods inſured, or what may be ſaved of them, which, from the notice of abandonment, become the property of the inſurers *(b)*. It operates as a transfer to them, in proportion to their reſpective ſubſcriptions, without any regard to the priority of the policies, if more than one *(c)*; and though the ſhip or goods ſhould appear, by the ſeveral policies, to be over-inſured *(d)*. And this tranſfer has a ſort of retroſpective relation in reference to the inſurers, who, to the extent of the ſum inſured, are preſumed to have been, from the beginning, owners of the things inſured *(e)*. *Quod repudiatur, retrò noſtrum non fuiſſe palam eſt (f)*.

And it relates back to the commencement of the voyage.

In *France* the abandonment of the ſhip transfers the freight ſhe has earned.

This principle is carried ſo far by the *French* law that, by the abandonment of a ſhip the inſurer becomes intitled to all the freight ſhe may have earned, freight being deemed an incident inſeparable from the ſhip. *Emerigon* even goes the length of ſaying that it is inconſiſtent with the nature of the contract of inſurance, that the owner ſhould claim the freight of a ſhip, the value of which he has received from the inſurer upon the abandonment.

(*a*) *Valin*, art. 60, p. 133, art. 47, p. 103. *Emerig.* tom. 2, p. 194.—(*b*) Vid. *Le Guidon*, ch. 7, art. 1.—(*c*) *Emerig.* tom 2, p. 194.—(*d*) Vid. ſup. ch. 4, § 4, p. 115.—(*e*) *Emerig.* tom. 2, p. 196.—(*f*) ff. Si quid in fraudem, 1.

And he ſupports this opinion upon the ground that in the courſe of the voyage the value of the ſhip muſt neceſſarily diminiſh in nearly the ſame proportion as the freight increaſes; and conſequently, that the value of the ſhip and freight at any given time in the voyage is only equal to the original value of the ſhip at the commencement of the voyage (*a*). But this notion could only have originated in the abſurd ſuppoſition that a ſhip can earn no more freight, in any voyage, than is ſufficient to reinſtate her in the ſame ſituation ſhe was in when ſhe ſailed on the voyage.

In *England* freight is inſurable ſeparately from the ſhip.

With us, however, freight is a matter inſurable, as we have already ſeen, ſeparately from the ſhip (*b*), and the abandonment of the ſhip does not transfer to the inſurer the freight ſhe has earned.

Where the inſurance is for leſs than the value of the thing inſured, the abandonment is in the ſame proportion.

But where the intereſt of the inſured is not entirely covered by the inſurance, he may abandon to the *extent* of the ſum inſured; for he is his own inſurer for the reſidue.—Thus, if goods of the value of 5000 l. be inſured only to the amount of 4000 l., and a total loſs happen, the inſured ſhall only abandon four fifths of what is ſaved; the remaining fifth will belong to himſelf (*c*); and he will be tenant in common, for that fifth, with the inſurers.—The ſame rule holds where the cargo, by a new purchaſe during the voyage, is augmented in quantity.

If goods be partly inſured, and money borrowed on reſpondentia for the reſidue; the inſurer will have the legal title to what is abandoned, and the lender an *equitable claim* for his proportion.

So, where goods are only partly inſured, and the owner has borrowed money on reſpondentia to the value of the reſidue; if he abandon, the inſurer and the lender have a joint claim to what is ſaved, in proportion to their reſpective intereſts. But by the abandonment, the inſurer is put in the place of the inſured, and has the *legal title* to the effects ſaved, and the lender only an *equitable claim* to his proportion (*d*).

In *France* the claim of the lender is preferred to that of the inſurer.

Yet, by the law of *France* (*e*), the claim of the lender, in ſuch caſe, ſhall be preferred to that of the inſurer,

(*a*) Vid. *Emerig.* t. 2, p. 221.—(*b*) Vid. ſup. ch. 3, § 4.—(*c*) *Emerig.* tom. 2, p. 215, 237. *Valin* ſur art. 47, l. 3, p. 106.—(*d*) Vid. *Emerig.* t. 2, p. 234.—(*e*) Ord. mar. tit. *contrats à la groſſe*, art. 18.

to

to the extent of his capital.—The reaſon of this preference is, that the lender contributes directly to the procuring of the goods; whereas the inſurer is only a ſurety to protect the adventurer from the riſk, without furniſhing the thing put in riſk. The lender has a ſubſtantial intereſt in the goods, and being in nature of a pawnee, has a ſort of *lien* on them, which cannot be diſcharged by the transfer which the abandonment operates to the inſurer. This only puts the inſurer in the place of the inſured; but the creditor and debtor can never have concurrent rights *(a)*. *Emerigon* even goes ſo far as to ſay that the lender's claim ought to be preferred, even for the marine intereſt.—*Valin (b)* holds a contrary opinion, and argues to refute this reaſoning of *Emerigon*, which was contained in a letter which he had received from *Emerigon* on this ſubject. *Emerigon*, however, in his book, ſupports his former opinion, and triumphs in this opinion being ſanctioned by that of *Pothier (c)*.

If there be three inſurances; one on the *ſhip and cargo*; one on the ſhip only; and one on the cargo only; *Emerigon (d)* thinks that inſurers on the ſhip and cargo have an equal claim on the effects ſaved, with the inſurers on the cargo only, and that they have a like claim on the freight, and the remains of the ſhip, with the inſurers on the *ſhip only*, in proportion to their reſpective ſubſcriptions.—For example: If a ſhip be valued at 5000 l., the cargo 5000l., total 10,000 l.; and theſe are inſured by different policies, thus;

If there be three policies, one on the ſhip and cargo, one on the ſhip only, and one on the cargo only; how, in caſe of abandonment, the claims of the different ſets of inſurers upon the produce of the ſhip and goods abandoned ſhall be adjuſted.

	£.
On ſhip and cargo - - -	3000
On the ſhip only - - -	3000
On the cargo only - - -	3000
Uninſured - - - -	1000
	10,000

(a) *Emerig.* tom. 2, p. 234, 235.—(b) *Valin*, tit. *contrats à la groſſe*, art. 18.—(c) *Pothier*, *contrats à la groſſe*, n. 49.—(d) Tom. 2, p. 240.

A ſhip-

A ſhipwreck happens, and the net proceeds of the wreck of the ſhip are 500 l., and of the cargo 500 l.; total 1000 l. *Emerigon* would adjuſt the claims of all parties thus:

	£.
To the owners for their part of ſhip and cargo uninſured, - - - -	100
To the inſurers on ſhip and cargo, a moiety of the produce of the wreck, - - -	225
The like to the inſurers on the ſhip, - -	225
To the inſurers on the cargo, a moiety of the produce of the goods ſaved, - -	225
The like to the inſurers on the ſhip and cargo,	225
	1000

By this adjuſtment the inſurers on the ſhip and cargo would have a double ſhare of the effects abandoned, which is manifeſtly unjuſt.—An *Engliſh* merchant would, I conceive, adjuſt the different claims thus:

	£.
To the owners for their part of ſhip and cargo uninſured, - - - -	100
To the inſurers on ſhip and cargo, a moiety of three fifths of the produce of the wreck, -	150
To the inſurers on the ſhip, three fifths of the produce of the wreck, - - -	300
To the inſurers on the cargo, three fifths of the produce of the goods ſaved, - -	300
To the inſurers on the ſhip and cargo, a moiety of three fifths of the produce of the goods ſaved, - - - -	150
	1000

If, after the loſs is paid, compenſation be made to the owner, this ſhall go to the inſurer.

The abandonment does not only entitle the underwriters to all that can be ſaved of the effects inſured; but if compenſation be made to the inſured for the injury from which the loſs aroſe, this compenſation ſhall go to the underwriters; for when they have paid the loſs,

loſs, they, and not the inſured, are the real ſufferers.—This will appear by the following caſe.

Repriſals were made on the *Spaniards* to indemnify the ſufferers by unjuſt captures: The inſurers, who have paid the owners the loſſes ſuſtained by thoſe captures, ſhall ſtand in their place, and receive their proportion.

Randal v. *Cockran*, in Chan. 1748. 1 *Vez.* 98.

The King granted letters of repriſal againſt the *Spaniards*, for the benefit of his ſubjects, in conſideration of the loſſes they had ſuſtained by unjuſt captures. The commiſſioners appointed to diſtribute the produce of theſe repriſals among the ſufferers, would not permit the *inſurers*, but the *owners* only, to make claim to the parts of the prizes allotted to the ſufferers, although the owners were already ſatisfied for their loſs by the inſurers, who thereupon brought their bill in *Chancery*.—Lord *Hardwicke*, C. decreed in favour of the inſurers.—He ſaid;—"The perſon originally ſuſtaining the loſs was the owner; but, after ſatisfaction made to him, the *inſurer*. No doubt but, from that time, as to the goods themſelves, if reſtored *in ſpecie*, or compenſation made for them, the inſured ſtood as a truſtee for the inſurer, in proportion to what he paid; although the commiſſioners did right to avoid being entangled in accounts, and in adjuſting the proportion between them. Their commiſſion was limited in time; they ſaw who was owner; nor was it material to them to whom he aſſigned his intereſt, as it was in effect after ſatisfaction made."

If the ſhip, after abandonment, arrive ſafe, the inſurer ſhall have all the profit of the voyage.

If, upon a total loſs happening, the ſhip be abandoned, but ſhe afterwards arrive ſafe; this ſhall not avoid the abandonment. On the one hand, the inſurers ſhall take to their own uſe all the profit of the voyage; and the inſured is entitled to nothing, except for ſo much as he was uninſured (*a*). On the other, they ſhall not, on account of the ſafe arrival of the ſhip, refuſe to pay the ſum inſured.—As if, upon a capture, the inſured abandon, and the ſhip be afterwards releaſed, or otherwiſe recover her liberty; the inſurers ſhall nevertheleſs ſatisfy the inſured as for a total loſs: But then they are entitled to all the benefit of the voyage (*b*).

(*a*) *Le Guidon*. ch. 7, art. 12.—(*b*) *Emerig*. tom. 2, p. 197.

But they cannot compel the inſured to take back the thing inſured, and refund the money.

So, if the ſhip or goods inſured happen to be recovered undamaged, after the inſurer has paid a total loſs; the following caſe will ſhew that he cannot compel the inſured to refund the money, and take back the ſhip or goods; but the inſurer ſhall ſtand in his place, and ſhall have the benefit of ſalvage.

A total loſs is paid on a quantity of bullion, which is afterwards recovered by the inſured: The inſurer cannot recover back more than his proportion of the value of it, after deducting the expence of ſalvage.

Da Coſta v. *Frith*, 4 *Bur.* 1966, ſup. 103.

An inſurance was made, "Upon any of the packet-"boats that ſhould ſail from *Liſbon* to *Falmouth*, for "one year, upon any kind of goods; ſuch goods to be "valued at the ſum inſured on the packet-boat, with-"out further proof of intereſt than the policy; and to "make no return of premium for want of intereſt, be-"ing on bullion or goods."—The defendant, who was one of the inſured, had an intereſt in bullion on board the *Hanover* packet, on a voyage from *Liſbon* to *Falmouth*. The ſhip was totally loſt off *Falmouth*; and the loſs was adjuſted at 100 l. *per cent.*; but by a memorandum on the policy, the inſured agreed that,—"*Should any* "*ſalvage* thereafter be recovered, he would refund to "the inſurers, *whatever he might ſo recover*, in ſuch pro-"portion as the ſum inſured bore to the whole intereſt;" and the inſurer accordingly paid the whole ſum inſured. —An iron trunk, which contained all the bullion, was afterwards fiſhed up, and the bullion recovered, without any loſs or prejudice whatever, and delivered to the inſurer. The expence of ſalvage amounted to 631. 8s. 2d. —The inſurer, upon this, brought an action againſt the inſured for money had and received, to recover back the amount of his ſubſcription. The defendant (the inſured) paid into court 48l. 4s., being the plaintiff's proportion of the value of the bullion recovered, after deducting the expence of ſalvage.—On the part of the plaintiff (the inſurer) it was contended that by the recovery of the bullion, the contract was performed on the part of the inſurers, and that the loſs could only be conſidered as a partial loſs, viz. the amount of the ſalvage; and that the agreement to allow the inſurer in the proportion of the ſum inſured to the whole intereſt, made no difference. —But the court were unanimouſly of opinion that the inſurer

insurer was not entitled to recover back the money he had paid to the insured, but only his proportion of the value of the goods saved, after deducting the expence of salvage, which was the sum paid into court.

An abandonment once properly made, upon a sufficient ground, and accepted by the insurers, is absolute and binding upon both parties; nor can it be revoked but by mutual consent (*a*). *Emerigon* says, that if a ship, by reason of sea-damage, be condemned as incapable of proceeding on her voyage, and the insured abandon; but the ship, being refitted, is brought home at the expence of the insurers; the insurers cannot compel the insured to take her back, but must pay the total loss (*b*).—*Valin* holds a contrary opinion, and says that if the insurers have not voluntarily paid the sum insured, they may, in such case, oblige the insured to take back the ship; the only question between them being, as to the amount of the partial loss (*c*). The opinion of *Emerigon* seems to be founded on the best reasoning.

An abandonment once properly made is irrevocable.

But the abandonment is irrevocable only where it is made upon a sufficient ground: And, therefore, if it appear to have been made upon a partial, and not a total loss; or upon information that proves false or unfounded, it will be void *ipso jure*. *Nam recte revocari, rescindi, et retrahi dicitur, quod ipso jure nullum est* (*d*).

But if it be not upon a sufficient ground, it will be void.

(*a*) *Pothier*, h. t. n. 138. *Emerig.* tom. 2, p. 197.—(*b*) *Emerig.* tom. 2, p. 195.—(*c*) *Valin*, on art. 60, h. t. p. 144.—(*d*) Vid. *Emerig.* tom. 2, p. 197.

Sect.

Sect. 5.

Of the ordering and diſpoſal of the Effects abandoned.

In caſe of misfortune, the inſured is bound to uſe his endeavours to ſave as much as poſſible.

IN caſe of ſhipwreck or other misfortune, the effects that are ſaved continue, till abandonment, the property of the inſured, who is bound in juſtice, honour, and conſcience, to uſe his utmoſt endeavours to make the moſt of what may be reſcued from deſtruction; in order, as much as poſſible, to lighten the burthen of the inſurers. To enable him to do this, without prejudice to his right of abandonment, our policies provide that, in caſe of any loſs or misfortune to the inſured, their factors, ſervants, and aſſigns, ſhall be at liberty to ſue, and labour about the defence, ſafeguard, and recovery of the goods and merchandizes and ſhip, &c. without prejudice to the inſurance; *to the charges whereof, the inſurers agree to contribute, each according to the rate and quantity of his ſubſcription.* The meaning of this clauſe is, that, till the inſured has been informed of what has happened, no act of the captain ſhall prejudice their right to abandon (*a*). There is a ſimilar proviſion in the policies of all other commercial countries, with a ſimilar undertaking on the part of the underwriters, to defray all expences, without limit, except in the policy uſed at *Marſeilles*, in which the inſurers only undertake to defray all expences occaſioned by the ſalvage, *provided they do not exceed the value of the effects ſaved*; a precaution, as *Emerigon* obſerves, which prevents their being ever liable for more than the ſum inſured (*b*). This accords with the ſentiments of *Cleirac*, who ſays that the expences of the

(*a*) Per *Aſhurſt*, J. in *Mitchell* v. *Edie*, ſup. 509.—(*b*) Vid. *Emerig.* tom. 2, p. 205.

recovery

recovery of the effects ſaved, ought not to increaſe the loſs beyond the ſum inſured (*a*). But this reſtriction has occaſioned many inconveniencies both to the inſured and inſurers (*b*), which is the reaſon, perhaps, why it has not been adopted in any other place that I know of.

Duty of the captain in the care of what may be ſaved.

As to the captain, the ſhip and cargo being confided to his care, it is peculiarly his duty, in order that he may ſhew himſelf worthy of ſo great a truſt, to employ all his courage, ſkill, and induſtry, in the protection and preſervation of the one and the other.

His power.

From the nature of his ſituation, he has an implied authority, not only from the inſured, but alſo from the inſurers and all others intereſted in the ſhip or cargo, in caſe of misfortune, to do whatever he thinks moſt conducive to the general intereſt of all concerned; and they are all bound by his acts (*c*). Therefore, if the ſhip be diſabled by ſtreſs of weather, or any other peril of the ſea, the captain may hire another veſſel for the tranſport of the goods to their port of deſtination, if he think it for the intereſt of all concerned that he ſhould do ſo. Or he may, upon the loſs of the ſhip, inveſt the produce of the goods ſaved in other goods, which he may ſhip for his original port of deſtination; and this, according to the doctrine of Lord *Mansfield* and Mr. Juſtice *Buller*, in the caſe of *Plantamour* v. *Staples* (*d*), ſhall bind the inſurers. For whatever is recovered of the effects inſured, the captain is accountable to the inſurers. If the inſured neglect to abandon when he has it in his power to do ſo, he adopts the acts of the captain, and he is bound by them. If, on the other hand, the inſurers, after notice of abandonment, ſuffer the captain to continue in the management, he becomes their agent, and they are bound by his acts (*e*).

(*a*) *Cleirac* ſur *Le Guidon*, ch. 20, art. 9.—(*b*) Vid. *Emerig.* tom. 2, p. 205.—(*c*) Per Lord *Mansfield* in *Mills* v. *Fletcher*, Sup. 498.—(*d*) Vid c. 11, § 2, ſup. 377.—(*e*) Per *Aſhurſt*, J. in *Mitchell* v. *Edie*, ſup. 509.

As

Duty of the ſailors.

As to the *ſailors*,—when a misfortune happens, they are bound to ſave and preſerve the merchandize to the beſt of their power; and while they are ſo employed, they are entitled to wages, ſo far at leaſt as what is ſaved will allow: But if they refuſe to aſſiſt in this, they ſhall have neither wages nor reward. In this the *Rhodian* law (*a*), and the laws of *Oleron* (*b*), of *Wiſbuy* (*c*), and of the *Hans Towns* (*d*), all agree.

(*a*) Leg. Rhod. art. 3.—(*b*) Art. 2.—(*c*) Art. 15.—(*d*) Art. 44.

CHAP. XV.

Of the Adjuſtment of Loſſes.

Preliminary Obſervations.

THE adjuſtment of a loſs is the ſettling and aſcertaining the amount of the indemnity which the inſured, after all allowances and deductions are made, is entitled to receive under the policy, and the fixing the proportion of this, which each underwriter is liable to pay. To aſcertain with due preciſion the amount of a loſs is ſometimes a work of conſiderable difficulty: And though this is generally performed, without litigation, by perſons converſant with this branch of buſineſs; yet queſtions ſometimes ariſe upon which the moſt experienced merchants cannot agree, and then the law muſt draw the line between them.

By the law of *England*, as it now ſtands, as well as by the general law of merchants, the contract of inſurance ought not to be lucrative to the inſured, nor enable him to make a profit out of the loſs of another. It ought merely to afford him an indemnity, and no more (*a*). The inſurer ought never to pay leſs, nor the inſured receive more, than that which a fair indemnity demands. And this ſhould be aſcertained, not upon ſubtilties and niceties, but upon plain and eaſy rules, the dictates of common ſenſe, drawn from the truth of the caſe.

In adjuſting a loſs, the firſt thing to be conſidered is, how the *quantity of the damage* for which the underwriters are liable, ſhall be aſcertained. This being known, the next, and generally the moſt difficult, point to be ſettled, is, by what rule this ſhall be *appreciated*. When theſe things are ſatisfactorily aſcertained, the adjuſtment is

(*a*) Vid. *Le Guidon*, ch. 2, art. 12; *Emerig.* tom. 1, p. 259.

uſually indorſed on the policy and ſigned by the underwriters. We will therefore conſider,

1. How this quantity of damage ſhall be aſcertained;
2. How the loſs ſhall be appreciated;
3. The effect of an adjuſtment.

Sect. I.

How the Quantity of Damage ſhall be aſcertained.

In caſe of a total loſs, where the inſured abandons, how the loſs ſhall be adjuſted.

WHEN a loſs has happened, the inſured ought to inform himſelf whether it be total, or partial; and if, under all the circumſtances, it appear to be a total loſs, and he decide to abandon, he muſt give notice of this to the underwriters in a reaſonable time, otherwiſe, as we have already ſeen *(a)*, he will wave his right to abandon, and muſt then be content to claim only as for a partial loſs.

If the policy be a valued one, and the loſs total,

When the loſs is admitted to be total, and the policy is a *valued* one, the inſured is entitled to receive the whole ſum inſured, ſubject to ſuch deductions as may have been agreed by the policy to be made in caſe of loſs. For the inſured, by allowing the value to be inſerted in the policy, agrees that it ſhall be taken as there ſtated; and it is the ſame as if he had admitted it at the trial of the cauſe *(b)*.

Difference between an open and a valued policy, as to the adjuſtment of a loſs.

It is only in the caſe of a total loſs that there is any difference between an open and a valued policy. Upon the latter, the value is admitted, and the inſured has only to prove, if the inſurance was on goods, that the goods valued were on board. Upon an open policy, it is not only neceſſary to prove that the goods were on board, but alſo the *value* of them; which value, not exceeding the ſum inſured, is the ſum the inſurers are bound to pay.

But in the caſe of a *partial loſs*, the like inquiry is to be made into the amount of the loſs, whether the policy be of the one ſort or of the other *(c)*. The indemnity

(a) Sup. 509, 510.—*(b)* Vid. ſup. 199.—*(c)* 2 *Bur.* 1171. Vid. ſup. 493.

ſecured

ſecured by either ſort of policy is, that if the thing inſured do not come ſafe to the port of deſtination, but is leſſened in value by damage received in the voyage, the loſs ſhall be borne by the inſurer.

When the loſs conſiſts in the *total loſs* of one entire individual, parcel of the goods inſured, and this is capable of a ſeveral and diſtinct valuation; as if, out of 100 hogſheads of ſugar, ten happen to be loſt, and the reſt arrive ſafe; the inſurer muſt pay the value of the ten *(a)*.

Rule, where the loſs conſiſts of one entire individual, capable of a ſeveral valuation.

When a part of the goods inſured is ſaved, and this exceeds the amount of the freight, the practice is to deduct the freight from the ſalvage, and to make up the loſs upon the difference. But where the freight exceeds the ſalvage, then it is a total loſs *(b)*.

When part of the goods is ſaved.

But where the goods inſured are damaged in the whole or in part, it becomes neceſſary to aſcertain the *quantity* of ſuch damage, which is done by taking the value of the goods, in their damaged ſtate, from the prime coſt, and the remainder will be the amount of the loſs.

Where all the goods are damaged.

If ſeveral articles be inſured for one entire ſum, but with a diſtinct valuation to each, and only one be put in riſk; if that one be loſt, the inſured ſhall recover ſuch a proportion of the ſum inſured as the value of that article bore to the value of the whole.

Where ſeveral articles are inſured, and only one put in riſk.

As, where the plaintiff wrote from *St. Kitts* to his agent in *London*, deſiring him to make inſurance on a ſhip and cargo to the amount of 5500 l. valuing the ſhip at 1500 l. Only 600 l. could be effected. No part of the cargo was ever put on board, ſo that in fact the policy attached only on the ſhip.—The ſhip being loſt, and an action brought on the policy, the above rule was contended for on the part of the defendant.—Lord *Kenyon*, who tried the cauſe, ſeemed to be of opinion that, as the whole ſum inſured was leſs than the value of the ſhip, the plaintiff was entitled to the whole.—But the jury having intimated that the rule as laid down by the defendant's counſel was

Amery v. *Rogers*, Eſp. Rep. 207.

(a) 2 *Bur.* 1170.—*(b)* Vid. *Boyfield* v. *Brown*, ſup. 507.

that which prevailed in ſuch caſes at *Lloyd's* coffee houſe, his lordſhip aſſented to their giving a verdict for ſuch a proportion of the ſum inſured as the value of the ſhip bore to the value of both ſhip and cargo.

When there is a clauſe to be free of average under ſo much *per cent.* how that proportion ſhall be aſcertained.

If there be a clauſe in the policy, to be free of average from a particular riſk, under ſo much *per cent.* and a loſs occaſioned by that riſk takes place; the proportion which the loſs bears to the cargo, muſt be calculated upon the cargo which was on board when the loſs happened, not upon that which was on board at any other time.

Rhol. v. *Parr*, *Eſp.* Rep. 444, Sup. 419.

Thus:—In a policy on a ſlave ſhip, there was a memorandum, to be free of average under 5 *per cent.* for loſs by inſurrection of the ſlaves.—An inſurrection took place when there were only 49 ſlaves on board. Seven of theſe were killed.—As this loſs muſt amount to 5 *per cent.* to make the underwriters liable, it became a queſtion, at what time the proportion which the loſs bore to the cargo ſhould be taken;—whether at the time when the inſurrection took place and the loſs happened, or when the whole cargo was on board. Upon examination of perſons acquainted with the practice in ſuch caſes, it was found that the time when the calculation was to be made, was, *when the loſs happened*, at which time the proportion of the loſs to the cargo then on board was to regulate the loſs to be borne by the underwriters.

Sect. 2.

How the Loſs ſhall be appreciated.

THE true price of any thing is that for which things of the like nature and quality are uſually ſold in the place where they are ſituated, if real property; or in the place where they are expoſed to ſale, if perſonal (*a*).

The firſt price is not always the true value.

The firſt price of a thing does not always afford a ſure criterion to aſcertain its true value. It may have been bought very dear, or very cheap. The circumſtances of

(*a*) *Pothier*, *des ventes*, n. 242.

time

time and place cauſe a continual variation in the price of things. For this reaſon, in caſes of general average, the things ſaved contribute, not according to the prime coſt, but according to the price for which they may be ſold at the time of ſettling the average. *Non quanti emptæ ſunt, ſed quanti veniri poſſunt*, is the rule of the *Rhodian* law (*a*). The ſame is adopted in the laws of *Wiſbuy* (*b*).

Averages are ſettled according to the price at the time of ſettling.

Upon the ſubject of the valuation of the goods inſured there has always been a great diverſity of opinion, not only among ſpeculative writers, but alſo among merchants themſelves. Some contending for the prime coſt, others for the current price at the time of the loſs; ſome inſiſting on the price at the time and place where the goods are ſhipped, others on the price at the port of diſcharge (*c*).

Different modes of appreciating a loſs.

In *France*, where almoſt all policies are valued, the inſured has his election to fix the previous valuation, either at the prime coſt, or at the current price at the time and place of loading. If the goods be of the growth or manufacture of the inſured, the latter valuation is always adopted (*d*). The ſame rule that applies to goods, applies alſo to the ſhip, which is always valued at the ſum ſhe is worth at the time of her departure (*e*), or at leaſt at the commencement of the riſk.—If goods, by being brought *from a diſtance*, are augmented in value, they may be eſtimated at their improved value, and an invoice made accordingly; nor ſhall the inſured be obliged to produce his original accounts, having a right to inſure the profit already acquired; and the inſurer muſt either abide by the invoice made by the inſured, or require a valuation by ſkilful perſons according to the *current prices of the time and place*.—It is uſual in *France* to ſtipulate in the policy that the ſhip ſhall remain of the ſame value during the voyage; which is the reaſon why *Valin* (*f*) ſays that where

How the valuation is made in *France*.

Goods brought from a diſtance may be valued at their improved price.

(*a*) ff. Leg. *Rhod.* l. 2, § 4.—(*b*) Laws of *Wiſb.* art, 20, and 30. Vid. *Santerna*, h. t. par. 3, n. 40. *Roccus*, n. 31.—(*c*) Vid. *Emerig.* tom. 1. p. 261.—(*d*) Vid. Ord. de la mar. h. t. art. 64, and *Valin* on this art. *Emerig.* tom. 1, p. 262.—(*e*) Vid. *Emerig.* tom. 1, p. 263.—(*f*) On art. 8 and 64, p. 56, 136.

the ship is abandoned, the *freight*, which augments in the same degree as the ship is depreciated in value during the voyage, is also abandoned, as being an inseparable incident to the ship (*a*).

In *England* the proper value consists of the prime cost and all charges.

In *England*, if the policy be an open one, it is an invariable rule to estimate a total loss, not by any supposed price which the goods might have been deemed worth at the time of the loss, or for which they might have been sold, had they reached the market for which they were destined; but according to the *prime cost*; that is, the invoice price, and all duties and expences till they are put on board, together with the premium of insurance. This is the only true, at least the only legal, mode of estimating a loss, whether total or partial, on goods; and therefore, whether the goods would have arrived at a good or a bad market is always immaterial (*b*). Neither is the difference of exchange to be at all regarded in the adjustment; for the underwriter does not insure against any loss arising from such causes (*c*).

The value is never affected by the rise or fall of the market, nor by the course of exchange.

It might, with some degree of plausibility, be insisted that the prime cost, after a long voyage, and when the goods insured had almost reached a market where they would have sold for a great profit, does not amount to an *indemnity*; for, beside the loss of the profit the merchant might reasonably have expected, he also loses all the benefit he could have derived from the use of his money in any other adventure. Upon this principle the *Consolato del mare* (*d*), in laying down rules for average contributions, declares, that if the goods be lost before half the voyage is performed, they are to be valued only at prime cost; but, if after, then at the price at which they might have been sold at the port of delivery.—However reasonable this rule may be, abstractedly considered, it would be more than counter-ballanced by the litigation it would occasion, to decide whether the voyage was half performed,

(*a*) Vid. sup. ch. 14, § 4.—(*b*) Per *Buller* J. at N. P. in *Dick* v. *Allin*, after Mich. 1785, *Park* 164.—(*c*) Per Lord *Kenyon*, in *Thellusson* v. *Bewick*, at N. P. *Esp.* Rep. —(*d*) Ch. 95.

formed, or if that were indisputable, then what was the market price at the port of delivery. But, be this as it may, it is the invariable rule in this country, upon an open policy to estimate a total loss upon goods, by adding to the prime cost all duties and expences and the premium of insurance; for this has constantly been deemed a full indemnity to the insured.

A ship is valued at the sum she is worth, at the time she sails on the voyage insured, including the expences of repairs, the value of her furniture, provisions and stores, the money advanced to the sailors, and, in general, every expence of the out-fit, to which is added the premium of insurance (*a*). How a ship shall be valued.

A partial loss upon either ship or goods, is that proportion of the prime cost, which is equal to the diminution in value occasioned by the damage. In the following case, which arose upon a valued policy upon goods, it was determined that the diminution in value, was that proportion of the value, in the policy, which the difference between the price of the sound, and the price of the damaged, bore to the price of the sound in the port of delivery. How damage to goods shall be estimated.

An insurance was made upon goods, "At and from "the Island of *St. Thomas* to *Hamburgh*, from the load- "ing at that island, till the ship should arrive and land "the goods at *Hamburgh*."—The goods which consisted of sugars, coffee, and indigo were valued; the clayed sugars at 30 l. per hogshead, *Muscovado* at 20 l.; and the coffee and indigo were also valued. Sugars were as usual, warranted free from average under 5 l. *per cent.* and all other goods under 3 l. *per cent.* unless general, or the ship should be stranded.—In the voyage the sea water got in; and when the ship arrived at *Hamburgh*, it appeared that every hogshead of sugar was damaged; so that it became necessary to sell them immediately at *Hamburgh*: And the difference between the price they sold for, and what Sugars *valued* at 30 l. *per* hogshead are so damaged in the voyage, that they are sold at the port of delivery, for 20 l. 0 s. 8 d. *per* hogshead, but, if sound, would have fetched 23 l. 7 s. 8 d.; so that the difference was 3 l. 7 s. *per* hogshead. The loss in this case, is that proportion of 30 l. (the value in the policy) which 3 l. 7 s. (the difference between damaged and sound at the port of delivery) bears to 23 l. 7 s. 8 d. the price of the sound at the port of delivery. —The amount of the loss does

(*a*) By the ord. de la mar. h. t, art. 20, the premium cannot be added to the other charges, yet the allowance of it is supported by the authority of *Le Guidon*, ch. 2, art. 9, ch. 15, art. 3, 13, 15, and the practice of all commercial nations.

not depend on the prices in the market at the port of delivery: But the proportion of the *prime coſt* which the loſs amounts to, may be aſcertained by the prices which the damaged and found bear to each other in the port of delivery.

Lewis v. *Rucker*, 4 *Bur*. 1167.

they would have fetched there, had they been ſound, was as 20 l. 0 s. 8 d. per hogſhead, is to 23 l. 7 s. 8 d. That is, they were ſold for 3 l. 7 s. per hogſhead leſs than they would have been worth, had they been found.—The defendant paid into court the like proportion of the ſum at which the ſugars were *valued in the policy*, as the price of the damaged bore to that of found ſugars at *Hamburgh* (*a*).—The only queſtion was by what meaſure or rule the damage ought to have been eſtimated.—The plaintiff proved that, at the time of the inſurance, ſugars were worth 35 l. per hogſhead at *Hamburgh*; but that the expectation of a peace had ſuddenly ſunk the price. That the owner of the ſugars, before the ſhip arrived at *Hamburgh*, and before he could know that they were damaged, had ſent orders that they ſhould be houſed there till the price ſhould riſe above 30 l. *per* hogſhead. That, in fact, the negociation not taking place, ſugars did not riſe 25 l. *per cent*. That he might have ſold theſe ſugars at 30 l. per hogſhead, if they could have been kept; and the damage they had received was the only reaſon why they were not kept. The plaintiff, therefore, inſiſted that the neceſſity of an immediate ſale, and the loſs ſuſtained by it, ought to have been taken into the account in computing the damage.—Lord *Mansfield*, who tried the cauſe, left it to the jury to decide, *whether the difference between*

(*a*) The reporter in this caſe makes Lord *Mansfield* ſtate that the ſum paid into court bore the like proportion to the ſum at which the ſugars were valued in the policy, (30 l.) as the price of the damaged ſugars (20 l. 0 s. 8 d.) bore to the price of the found at *Hamburgh* (23 l. 7 s. 8 d.). That is, the ſum ſuppoſed to have been paid into court, was to 30 l. as 20 l. 0 s. 8 d. is to 23 l. 7 s. 8 d. This, by a common operation of arithmetic, would be 25 l. 14 s. *per* hogſhead, which ſhews that the rule by which the money was paid into court, is not correctly ſtated in the report. The ſum paid into court muſt have borne the ſame proportion to 30 l. as 3 l. 7 s. (the difference between the found and damaged ſugars at *Hamburgh*) bore to 23 l. 7 s. 8 d. (the price of the found there). This comes to 4 l. 5 s. 11 d. ½ *per* hogſhead, the real amount of the loſs, according to the principles laid down by Lord *Mansfield*, in delivering the opinion of the court.

the

the ſound and the damaged ſugars, at the port of delivery, ought to be the rule: Or, whether *the loſs occaſioned by an immediate ſale* ſhould be taken into conſideration. The jury, amongſt whom were many conſiderable merchants, who perfectly underſtood the ſubject, and formed their judgment from their own experience, found the defendant's rule of eſtimation to be right, and gave their verdict for him accordingly.—Upon a motion for a new trial, the court were unanimouſly of opinion that the plaintiffs were not entitled to have the price for which the damaged ſugars were ſold, made up to 30 l. per hogſhead; and that the rule by which the jury had gone was the right meaſure.—Lord *Mansfield*, in delivering the opinion of the court, ſaid,—"The rule by which the defendant and the jury have gone is this,—the defendant takes the proportion of the difference between ſound and damaged ſugars in the port of delivery, and pays that proportion upon the value of the goods ſpecified in the policy; and has no regard to the price, *in money*, which either ſound or damaged ſugars bore at the port of delivery. He ſays the proportion of the difference is equally the rule, whether the goods came to a riſing or a falling market. For inſtance; ſuppoſe the prime coſt or value in the policy to be 30 l. and the damaged goods ſell for 40 l.; but, if ſound, would have ſold for 50 l; the difference is a fifth: The inſurer muſt therefore pay a fifth of 30 l:—*E converſo*, if they come to a loſing market, and, being damaged, ſell for 10 l.; but, if ſound, would have ſold for 20 l.; the difference is one half: The inſurer muſt therefore pay 15 l. that is half the prime coſt or value in the policy. Two objections have been made to this rule: *Firſt*, that it is going by a different meaſure in the caſe of a *partial*, from that which governs in the caſe of a *total*, loſs; for, upon a total loſs, the prime coſt, or value in the policy, muſt be paid.—The anſwer to which objection is, that the diſtinction is founded in the nature of the thing. Inſurance is a contract of indemnity againſt the perils of the voyage, to the amount of the value in the policy; and therefore if the thing be totally loſt, the inſurer muſt pay the

This rule equally holds whether the goods come to a riſing or a falling market.

the whole value which he insured at the out-set. But, where a *part* of the commodity is spoiled, no measure can be taken from the prime cost to ascertain the quantity of the damage sustained. The only way is to ascertain whether the thing be a third or a fourth worse than the sound commodity; and then pay a third or fourth of the prime cost or value of the goods so damaged (*a*). The *second* objection is, that this being a valued policy, was in nature of a *wager*; and if so, there could be no *partial* loss, and the insured could only abandon and recover it for a total loss; because the value specified was fictitious." —In answer to this objection, his Lordship said, "To argue that there can be no adjustment of a partial loss upon a valued policy, is directly contrary to the very terms of the policy itself. It is expressly provided that the article of *sugar* shall be subject to *average*, if the loss exceed 5 *per cent.*; and even if it were not subject to average, the consequence would be that every partial loss must thereby become total: But then, the insured could only recover in the event of a total loss; and consequently the plaintiffs in this case would not be entitled to recover at all; for there is no colour to say that this was a total loss; besides the plaintiffs have taken the goods and sold them. In opposition to the measure which the jury have gone by, the plaintiffs contend that they ought to be paid the *whole value in the policy*, upon one of two grounds. 1st. That the general rule of estimating should have been the difference between the price the damaged goods sold for, and the prime cost, or value in the policy. Here the da-

(*a*) Lord *Mansfield*, in this answer to the first objection, seems, according to the report, to have been labouring to account for the supposed difference between the measure in the case of a partial and a total loss. But with great deference, it would seem that the rule to which the objection is made, and which fixes the proportion of the *prime cost* which must be paid in case of a partial loss, is not inconsistent with, but is founded upon, the practice of paying the whole of the prime cost upon a total loss.

maged

maged goods ſold for 20 l. 0 s. 8 d. per hogſhead; and the underwriters ſhould make it up 30 l.—To this I anſwer, that it would involve the underwriter in the riſe or fall of the market; and, in ſome caſes, ſubject him to pay vaſtly more than the loſs; in others, it would deprive the inſured of any ſatisfaction, though there were a loſs.—For inſtance; ſuppoſe the prime coſt, or value in the policy, 30 l. per hogſhead; the ſugars damaged; the price of the ſound 20 l.; the price of the damaged 19 l. 10 s.: The loſs is about a *fortieth*, and the inſurer would be obliged to pay above a *third*.—Suppoſe they come to a riſing market; the ſound ſugars ſell for 40 l.; the damaged for 35 l. The loſs is an *eighth*; yet the inſurer would have to pay nothing.—The 2d ground upon which the plaintiffs contended that the 30 l. ſhould be made up, was, that it appeared that the ſugars *would* have ſold for that price, if the damage had not made an immediate ſale neceſſary.—The moment the jury brought in their verdict, I was ſatisfied they had done right in diſregarding the *particular circumſtances* of this caſe; and I was convinced of this, after converſing with perſons of experience in adjuſtments, and after the ſubject had been fully argued at the bar. The nature of the contract is that the goods ſhall come ſafe to the port of delivery; or if not, that the inſurer will indemnify the inſured to the amount of the prime coſt. If they arrive, but leſſened in value by damage received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it muſt be, by putting the inſured in the ſame ſituation, (relation being had to the prime coſt, or value in the policy), which he would have been in, if the goods had arrived free from damage; that is, by paying ſuch *proportion*, or *aliquot part*, of the *prime coſt*, or value in the policy, as correſponds with the proportion, or aliquot part, of the *diminution in value* occaſioned by the damage. The duty accrues upon the ſhip's arrival and landing her cargo at the port of delivery; and the inſured has then a right to demand ſatisfaction. The adjuſtment can never depend upon future events or ſpeculations;

An inſurer is never to be involved in the riſe or fall of the market.

The indemnity ſecured by the policy is ſuch an aliquot part of the prime coſt as correſponds with the diminution in value occaſioned by the damage.

The duty accrues upon the ſhip's arrival and landing her cargo; and does not depend on future contingences.

ſpeculations: How long is he to wait; a week, a month, or a year?—In this caſe, the price roſe; but, if peace had been made, the price would have fallen: But the defendant did not inſure that there ſhould be no peace. It is true that the owner acted upon political ſpeculation, and ordered the ſugars to be kept till the price ſhould be 30 l. or upwards: But no private ſcheme or project of trade of the inſured can affect the inſurer: He knew nothing of it: He did not undertake that ſugars ſhould bear a price of 30 l. a hogſhead. If ſpeculative diſtinctions of the merchant, and the ſucceſs of ſuch ſpeculations, were to be regarded, it would introduce the greateſt injuſtice and inconvenience. The inſurer knows nothing of them. Here, the orders were given after the ſigning of the policy. But the deciſive anſwer is, that the underwriter has nothing to do with the price, and that the right of the inſured to a ſatisfaction, where goods are damaged, ariſes immediately upon their being landed at the port of delivery.

No ſpeculation of the inſured can increaſe or diminiſh the amount of the loſs.

In this caſe, which I have abſtracted more fully than uſual, the inſurance was on goods which were valued in the policy, but whoſe real value depended, at the time the inſurance was effected, on a fluctuating market. The goods which were damaged in the voyage, came to a fallen market, where the price was leſs than the value in the policy. The inſured inſiſted on being paid the difference between the price for which the goods were ſold in the port of delivery, and the *value in the policy*. But it was determined that he was only entitled to the proportion of the value in the policy which their diminution in value bore to the price of ſound goods, of the ſame ſort, in the port of delivery; thus uſing the relative prices of the ſound and damaged goods at the port of delivery as the means of aſcertaining the proportion of the *prime coſt*, which the inſurer was bound to pay.

Obſervations on the above caſe, and that which follows.

In the following caſe, which came before the court of King's Bench many years afterwards, there was a partial loſs upon a valued policy, but the value in the policy *exceeded the intereſt of the inſured*. There, Lord *Mansfield* and the other judges of the court declared, that it was the conſtant uſage in

If the value in the policy exceed the intereſt of the inſured, the loſs is adjuſted in the ſame manner as if the policy were an open one; and the computation

in ſuch caſes, to adjuſt a partial loſs in the ſame manner as if the policy were an open one; and that the computation muſt therefore be by the *real intereſt* on board, and not by the value in the policy.

muſt be made by the real intereſt on board, not by the value in the policy.

That was an inſurance on a ſhip and goods on board, —"At and from *Omoa* to *London*; valued at the ſum "inſured." There was no value mentioned in the body of the policy, but only the ſums wrote againſt the different names on the back. There were other policies on the ſame ſhip and goods, amounting in the whole to 99,500 l. which exceeded the amount of the intereſt of the inſured (*a*). The ſhip and a great part of the cargo were loſt, about one tenth only of the goods being ſaved. One queſtion at the trial of this cauſe was, how the loſs, which was conſidered as a partial one, ſhould be adjuſted (*b*). The broker ſwore that, on ſuch policies as this, where a *total loſs* happened, the whole ſum was paid: But where it was only a partial loſs, they conſidered it as an open policy, and paid a proportion, not of the ſum inſured, but of the value of the goods.—The court of King's Bench, when this came before them, thought it, at firſt, like the caſe of *Lewis* v. *Rucker* (*c*). But the intereſt of the inſured, in the ſhip and goods, being leſs in value than the ſum inſured, the court held, that this caſe differed from that of *Lewis* v. *Rucker*, and that the conſtant uſage in ſuch caſes was, upon a total loſs, to pay the whole (*d*); but, upon a partial loſs, to conſider it as an *open policy*. The court were therefore of opinion that the computation in this caſe muſt be by the *real in-*

Le Cras v. *Hughes*, B. R. E. 22 G. III. MS.

(*a*) The ſhip and goods inſured had been captured by ſea and land forces jointly. The inſurance was on behalf of the officers and crews of the ſhips; but as the land forces were entitled to a ſhare in this prize, the intereſt of the inſured was therefore leſs than the value of the ſhip and goods, and leſs than the ſum inſured. Vid. ſup. 84, 111.—(*b*) The principal queſtion was, whether the inſured had an inſurable intereſt in the ſhip and goods. For this vid. ſup. 84, where there is a fuller report of this caſe.—(*c*) Sup. 535.—(*d*) Vid. ſup. 199.

tereſt

tuns of the inſured on board, and not by the value in the policy.

The true ground of diſtinction between this caſe and that of *Lewis* v. *Rucker* is, that, in that caſe, the value in the policy was conſidered as the *prime coſt*, and this was never diſputed; whereas, in this caſe, it appears that the intereſt of the inſured was conſiderably leſs than the value in the policy.

Sect. 3.

Of the Effect of an Adjuſtment.

An adjuſtment ſigned by the underwriters is *primâ facie* evidence againſt them, and ſufficient of itſelf, if not impeached, to entitle the inſured to recover without any other proof.

AN adjuſtment being indorſed on the policy and ſigned by the underwriters, with a promiſe to pay in a given time, is *primâ facie* evidence againſt them, and amounts to an admiſſion of all the facts neceſſary to be proved by the inſured to entitle him to recover in an action on the policy. It is like a note of hand, and being proved, the inſured has no occaſion to go into proof of any other circumſtance. This was the opinion of Lord C. J. *Lee* in the following caſe.

Hog v. *Gouldney*, at N. P. after Trin. 1745, at G. H. *Beawes* 310.

An inſurance was made on a ſhip "At and from "*Jamaica* to *London*, intereſt or no intereſt, and without "benefit of ſalvage, with a warranty that the ſhip ſhould "ſail with convoy."—The ſhip ſailed with convoy, but was ſo much damaged in the voyage, that ſhe was obliged to bear away for *Charleſton*, where ſhe was condemned and broke up.—All the underwriters, being ſatisfied of the truth of this caſe, paid their loſſes, except the defendant, who went ſo far as to ſettle it, and according to the cuſtom upon ſuch occaſions, indorſed the policy in theſe words;—"Adjuſted the loſs on this policy at "98*l. per cent.*, which I agree to pay one month after "date. *London*, 5th *July* 1745. *Harry Gouldney*."—When the money became due, he inſiſted on fuller proof, particularly of the ſhip's ſailing with convoy, and her condemnation.—An action was brought on the policy; and Lord C. J. *Lee*, who tried the cauſe, was of opinion

(a) that

that this was to be considered as a note of hand, and that the plaintiff had no occasion to enter into the proof of the loss. The jury found a verdict for the plaintiff.—The same rule was followed, the next year, by the same learned judge, in the case of *Hewett v. Flexney (a)*.

It has been observed that the words used by Lord Chief Justice *Lee*, in this case, were *extremely large (b)*; and that the true rule upon the subject might be better collected from two subsequent cases, which will be mentioned hereafter. The words which are supposed to be too large are, "That the memorandum indorsed on "the policy, was to be considered as a note of hand, "and that the plaintiff had no occasion to enter into the "proof of the loss."—It is not easy to discover in what respect the rule here laid down is too large. The memorandum indorsed on the policy, and signed by the defendant, unquestionably amounts to an admission of his subscription to the policy, of the plaintiffs interest in the ship insured, (if the terms of the policy had not rendered that unnecessary), of her having sailed with convoy, of a loss having happened, and that the amount of that loss was the sum specified in the adjustment, which contains a promise to pay in one month. This, like a note of hand, is *primâ facie* evidence of a debt; and it seems to be as unnecessary for the plaintiff, in an action on the policy, to prove the facts admitted by the adjustment, as to prove the consideration of a note of hand, before it is impeached.—But in neither case is "*the door shut against* "*inquiry*." A note of hand is not *conclusive* evidence of a consideration, though value received be expressed in it. On the contrary, it may be impeached by shewing that it was made upon an unlawful, or corrupt consideration, or without any consideration at all. So, an adjustment, like that which is stated in the foregoing case, may be impeached by shewing that the underwriter was induced to sign it by some fraud or concealment, or by some misconception of the law or fact. But, in either

This rule objected to.

The rule vindicated.

The adjustment admits the whole case, and like a note of hand, is *primâ facie* evidence of a debt.

It is not, however, conclusive, but may be impeached by evidence.

(a) *Beawes* 308.—(b) *Park* 118.

case,

caſe, this muſt be done by *evidence*, and not by *doubts or ſurmiſes* after the time for payment is come; nor can the plaintiff be put under the neceſſity of proving the conſideration of the note, in the one caſe, or the facts admitted by the adjuſtment, in the other, until a ſtrong ground of ſuſpicion, at leaſt, be raiſed againſt it by *evidence* on the part of the defendant.

The adjuſtment may be given in evidence in an action on the policy; and the inſured is not obliged to declare eſpecially on it.

In the firſt of the two caſes adduced in ſupport of the objection to the rule, as laid down by Lord C. J. *Lee*, a loſs had been adjuſted at 50 *per cent.*, and an action was brought on the policy.—It was contended on the part of the defendant, that the adjuſtment was not binding; but that, if it were, it ought to have been declared on *ſpecially*.—Lord *Kenyon*, who tried the cauſe, was of opinion that it was not neceſſary to declare ſpecially. He ſaid that the adjuſtment was *primâ facie* evidence againſt the defendant: But if there had been any miſconception of the law or fact upon which it had been made, the underwriter was not *abſolutely concluded* by it.—This turned out to be the caſe, and there was a verdict for the defendant.

It is *primâ facie* evidence againſt the underwriter; but he may impeach it.

Rodgers v. *Maylor*, at N. P. after Trin. 1790, *Park* 118.

The doctrine of Lord *Kenyon*, in this caſe, far from ſhaking, or even narrowing the rule, as laid down by Lord C. J. *Lee*, ſeems, on the contrary, to have ſtrongly confirmed it. Lord *Kenyon* ſays, that if there had been any miſconception of the law or fact upon which the adjuſtment had proceeded, the underwriter would not have been *abſolutely concluded* by it. It is plain then, that he conſidered the adjuſtment like a note of hand, as *primâ facie* evidence of a debt, but not concluſive, ſince the adjuſtment, like the note of hand, might be impeached by evidence on the part of the defendant.

De Garron v. *Galbraith*, at N. P. after Trin. 1795. *Park* 118.

In the ſecond caſe adduced in ſupport of the objection to the rule, as laid down by Lord C. J. *Lee*, it is ſtated that the plaintiff went to trial, having no evidence to produce but the adjuſtment; and the witneſs who proved it, ſwore that, ſoon after they had ſigned it, *doubts aroſe in the minds of the underwriters*, and they refuſed

fuſed to pay, upon which, Lord *Kenyon* ſaid that, under theſe circumſtances, the plaintiff muſt go into other evidence; and not being able to do this, he was nonſuited.—In the following term, a motion was made to ſet aſide this nonſuit, upon the ground that an adjuſtment was *primâ facie* evidence of the whole caſe, and threw the *onus probandi* upon the underwriter; and that it amounted to more than proof of the defendant's ſubſcription to the policy.—Lord *Kenyon* ſaid;—"I admit the adjuſtment to be evidence in the cauſe to a certain extent: But I thought at the trial, and ſtill think, that when the ſame witneſs who proved the ſignature of the defendant to the adjuſtment ſaid, that doubts, ſoon after the adjuſtment took place, aroſe in the minds of the underwriters, *as to the honeſty of the tranſaction*, and they called for further proof, the plaintiff ſhould have produced other evidence; and that, ſhutting the door againſt enquiry, after an adjuſtment, would be putting a ſtop to candour and fair dealing amongſt the underwriters.—Accordingly the court refuſed to grant a new trial.

In the account of what paſſed at the trial of this cauſe, it does not appear upon what ſubject the doubts aroſe in the minds of the underwriters, nor at what time the further proof was called for. It would ſeem, from the above report, that further proof was only called for at the trial by the learned judge who tried the cauſe. It is unfortunate that there is no account of this caſe in the term reports, the ſixth volume of which contains the caſes of the term in which it is ſaid to have come before the court. It is to be preſumed that an accurate ſtatement of the evidence on which the plaintiff was nonſuited, would have clearly ſhewn that the deciſion of the learned judge at *niſi prius*, and afterwards of the court of King's Bench, was correctly right; that juſtice was done; and that, under the particular circumſtances of the caſe, this might have been a very proper exception to the rule, as laid down by Lord C. J. *Lee*. But as the caſe ſtands, in the above report of it, it would be very difficult to reconcile it, even to the deciſion of the ſame learned judge in the above caſe

Whether this caſe can be deemed a ſufficient authority to narrow the rule laid down by Lord C. J. *Lee*.

of *Rodgers* v. *Maylor* (*a*); nor can it be accounted for, upon any known principle of law, that an underwriter, who had ſigned an adjuſtment of a loſs with a promiſe to pay it, might afterwards, merely becauſe he choſe to alledge that *doubts had ariſen in his mind*, refuſe to pay the ſum he had acknowledged to be due; and that, merely on the ſuggeſtion of theſe doubts, the inſured ſhould be called upon at the trial to prove his whole caſe, at a time, too, when it was no longer, perhaps, in his power to procure the neceſſary evidence. The candour and fairneſs which ought to preſide in the litigation of all commercial queſtions, would never go the length of requiring this. If, indeed, the underwriters, harbouring theſe doubts, ſhould give the inſured reaſonable notice of their intention to diſpute his claim, it would be competent to them, perhaps, to do ſo; and even then, they ought to come prepared to ſhew ſome fraud or concealment on the part of the inſured; or ſome miſconception of the law or the fact, on their own part, which had induced them to agree to the adjuſtment. This would certainly make an end of the adjuſtment, and it would then be incumbent on the inſured, under whatever difficulty, to go into the proof of his whole caſe. It is poſſible, nay, very probable, that this, or ſomething like it, appeared in the caſe of *De Garron* v. *Galbraith*. But, as that caſe is reported, it cannot be deemed of ſufficient weight or authority to alter or ſhake the rule as laid down in the caſe of *Hog* v. *Gouldney*; and which, as has been already obſerved, is greatly enforced and confirmed by Lord *Kenyon*, in the caſe of *Rodgers* v. *Maylor* (*b*).

But it is ſaid, that the ſpirit of the rule laid down in this laſt caſe, was adopted in the *very modern* caſe of *Thelluſon* v. *Fletcher* (*c*), which has been already fully

(*a*) Sup. 544.—(*b*) Vid. *Chriſtian* v. *Coombe*, *Eſp.* Rep. 486, where Lord *Kenyon* lays down the ſame doctrine.—(*c*) *Thelluſon* v. *Fletcher* was determined 16 years *before* that of *De Garron* v. *Galbraith*.

ſtated

ſtated *(a)*. The only point determined in that caſe at all applicable to the preſent ſubject was, that, if an underwriter ſuffer judgment to go by default, he thereby confeſſes the plaintiff's title to recover, and the plaintiff ſhall not, therefore, be obliged to prove his intereſt; a point about which, without that deciſion, no lawyer could have entertained much doubt.—All that can be ſaid on this determination is, that, as far as it can be ſuppoſed to bear on the preſent queſtion, it corroborates the rule as laid down by Lord C. J. *Lee*.

(*a*) Sup. 105.

CHAP. XVI.

Of Return of Premium.

THE premium paid by the inſured, and the riſk which the inſurer takes upon himſelf, are conſiderations each for the other: They are correlatives, whoſe mutual operation conſtitutes the eſſence of the contract of inſurance. The inſurer ſhall not be expoſed to the riſk, without receiving the premium; nor ſhall he retain the premium, which was the price of the riſk, if, in fact, he runs no riſk at all *(a)*. For wherever a man receives the money of another upon a conſideration which happens to fail, or is never performed, he is under an obligation, from the ties of moral honeſty and natural juſtice, to refund it. In ſuch caſe, the law implies a debt, *quaſi ex contractu*, and gives the inſured an action againſt the inſurer, for money had and received to his uſe, to recover back the premium *(b)*.

It will be our buſineſs in the preſent chapter, to ſhew under what circumſtances the inſured ſhall be entitled to demand a return of premium.—The caſes in which the inſured ſhall be entitled to ſuch return, may be reduced to the following heads;

1. Where the contract is void *ab initio*;
2. Where the riſk has not been commenced;
3. Upon the performance of certain ſtipulations;
4. When the deduction of one half *per cent.* ſhall be allowed.

(*a*) Per Lord *Mansfield*, 3 *Bur.* 1240.—(*b*) Vid. 2 *Bur.* 1008; *Doug.* 454; *Cowp.* 668; 1 *Show.* 156. 3 T. R. 266.

Sect. 1.

Of Return of Premium where the Contract is void ab initio.

IN general, when the contract is void *ab initio*, it is ſo, either for want of intereſt in the inſured, or becauſe the inſurance is illegal, or for fraud on the one ſide or the other.—We will enquire in what caſes there ſhall be a return of premium on each of theſe grounds.

1. *Where the Contract is void for Want of Intereſt.*

A want of intereſt may be either *total*, as where the inſured has nothing on board the ſhip; or *partial*, as where he has an intereſt in the thing inſured, but not to the amount ſtated in the policy. And it may be laid down as a general rule, that if, through miſtake, miſinofrmation, or any other innocent cauſe, an inſurance, in a ſingle policy, be made without any intereſt whatſoever in the thing inſured, or to a much larger amount than its real value; in the one caſe, the inſurer ſhall return the whole premium; in the other, he ſhall return upon all above the true value. Thus, if a man, ſuppoſing he has goods on board a certain ſhip to the value of 1000l. inſure to that amount, but afterwards find either that he has no goods at all on board, or that he has goods only to the amount of half the inſurance: In the one caſe, he would be entitled to a return of the whole premium; in the other to a return of a moiety *(a)*. And all the underwriters upon a policy in which the effects are inſured beyond their value, muſt bear any loſs that

If an inſurance be made without intereſt, or for more than the real intereſt, there ſhall be a return of premium.

(a) Vid. *Le Guidon*, ch. 2, art. 18, Ord. of *Amſt.* art. 22. *Pothier* h. t. n. 77, 183. *Roccus*, n. 82. *Valin*, ſur art. 23, p. 67.

may happen, and repay a part of the premium, in proportion to their reſpective ſubſcriptions, without regard to the priority of their dates *(a)*.

If there be an over-inſurance by ſeveral policies, the underwriters will all be liable to the extent of the value; and they will all be entitled to a return of premium for the reſidue.

If, by *ſeveral policies*, made without fraud, the ſum inſured exceed the value of the effects, theſe ſeveral policies will, in effect, make but one inſurance, and will be good to the extent of the true intereſt of the inſured; and, in caſe of loſs, all the underwriters on the ſeveral policies ſhall pay according to their reſpective ſubſcriptions, without regard to the priority of their dates. It follows from thence that all the underwriters on the ſeveral policies would be equally entitled to a return of premium for the ſum inſured above the value of the effects, in proportion to their reſpective ſubſcriptions.—In this particular, our law, as we have already ſhewn *(b)*, differs from the ancient law, and indeed from the law of moſt of the other maritime ſtates at this day.

Upon a wager policy the inſured cannot recover back the premium, at leaſt after the riſk is run.

We have already ſeen that a wager policy, at leaſt ſince the ſtat. 19 *G.* II, c. 37, is illegal and void *(c)*. Upon ſuch a policy the inſured cannot recover back the premium. At leaſt if he wait till the riſk is over, he ſhall not, after thus taking the chance of a loſs, and of obtaining from the *generoſity*, at leaſt, of the underwriters, the ſum inſured, be permitted to recover back the premium.

Lowry and another v. *Bourdieu*, *Doug.* 451.

The plaintiffs had lent one *Lawſon*, captain of the Lord *Holland* Indiaman, 26,000 l., for which he gave them a *common bond*. While he was with his ſhip at *China*, the plaintiffs got a policy underwritten by the defendant and others, "At and from *China* to *London*, "beginning the adventure upon the goods from the load-"ing thereof on board the ſaid ſhip at *Canton*, &c. and

(*a*) Habet omnis aſſecuratio hoc peculiare, ut in ea non ſit prius nec poſterius, quantum ad effectum et validitatem contractus; ſed ultimus aſſecurator tantundem participat in damno et lucro ex aſſecuratione provenienti, quantum prior. *Kuricke* diatr. p. 16.—(*b*) Vid. ſup. 115, 116.—(*c*) Vid. ſup. ch. 4, § 2.

"upon

" *upon the ſaid ſhip* from her arrival at *Canton*, valued at " 26,000 l., being the amount of Captain *Patrick Law-* " *ſon*'s common bond payable to the parties, as ſhall be " deſcribed at the back of this policy, dated 16th *Decem-* " *ber* 1775: And in caſe of loſs, no other proof of in- " tereſt to be required than the exhibition of the ſaid " bond; warranted free from average, and without be- " nefit of ſalvage to the inſurers."—At the head of the ſubſcription was written, " *On a bond as above expreſſed.*" —Captain *Lawſon* ſailed from *China* and arrived ſafe with his adventure in *London*.—The inſured brought an action to recover back the premium, on the ground that the inſurance having been made without intereſt, the policy was void, within the ſtatute *(a)*. There was a verdict for the defendant by the direction of Lord *Mansfield*, who tried the cauſe, upon the ground that, though the policy was void, as being without intereſt, yet that both parties were equally guilty of a breach of the law, and therefore the rule *in pari delicto, melior eſt conditio poſſidentis* applied, and the plaintiffs could not recover back the premium. Upon a motion for a new trial, the court adopted this opinion.—Lord *Mansfield* ſaid,—" This is clearly a gaming policy. The nature of the inſurance is known to both parties. The plaintiffs ſay; 'We mean to game; but we give our reaſon for it; captain *Law-* *ſon* owes us a ſum of money, and we want to be ſecure in caſe he ſhould not be in a ſituation to pay us.' It was a hedge. But they had no intereſt; for, if the ſhip had been loſt, and the underwriters had paid, ſtill the plaintiff would have been entitled to recover the amount of the bond from *Lawſon*.—This, then, is a gaming policy, and againſt an act of parliament; and therefore it is clear that the court will not interfere to aſſiſt either party; according to the well known rule, that, *in pari delicto melior eſt conditio poſſidentis:* Not, that the defendant's right is better than that of the plaintiff; but he muſt draw his remedy from clear fountains."—Mr. Juſ-

(*a*) 19 *G.* II., c. 37, ſup. 103.

tice *Aſhurſt* concurred in this opinion. Mr. J. *Willes* thought that this was not a gaming policy; that the money was paid upon a miſtaken idea, and ought to have been refunded.—Mr. Juſtice *Buller* agreed with Lord *Mansfield* and Mr. Juſtice *Aſhurſt*, that this was a gaming policy, being without intereſt: But he held that the reaſon why the plaintiffs could not recover was, that an action brought to reſcind a contract, muſt be brought while the contract continues executory; and then it can only be done on the terms of reſtoring the other party to his original ſituation. He mentioned a caſe of *Walker* v. *Chapman*, in B. R. ſome years before, where a ſum of money had been paid in order to procure a place in the cuſtoms. The place had not been procured, and the party who paid the money, having brought his action to recover it back; it was held that he ſhould recover, becauſe the contract remained executory. "So," ſaid he, "if the plaintiffs in this caſe had brought an action before the riſk was over, they might have recovered; but having waited till the riſk was run, it was then too late (*a*)."

Yet, before the riſk is run, and while the contract is executory, the inſured may recover back the premium.

The reader, in peruſing the foregoing caſe, muſt have obſerved that though Mr. Juſtice *Buller* concurs in opinion

(*a*) There is a caſe of *Wharton* v. *De la Rive*, (at N. P. after Mich. 1782), mentioned in *Park* 376, where an action is ſaid to have been brought on two wagers, "one of 26l. 5s. to 100l.: the other of 13l. 2s. 6d. to 30l." that the *American* colonies would be acknowledged as independent ſtates by *France*, ſome time between the firſt of *February* and the firſt of *April* 1778. It is ſtated, that upon the opening of the caſe for the plaintiff, Lord *Mansfield* directed a nonſuit, but it does not appear upon what ground; whether becauſe the wagers were illegal, or becauſe they were in nature of wagering inſurances, and void by the act. It is ſaid, however, that the plaintiff's counſel inſiſted on a verdict for the premium, as if they were in fact inſurances, which Lord *Mansfield* permitted, upon the ground of the contract being void. The caſe of *Lowry* v. *Bourdieu* was then cited by the defendant's counſel, to ſhew that he was entitled to keep the premium. Lord *Mansfield* is made to anſwer,

nion with Lord *Mansfield*, that the insured was not, under all the circumstances of the case, entitled to a return of the premium, yet he assigns a different reason for his opinion.—Lord *Mansfield* considered the insurance as an illegal contract, and both parties offenders against the law; and then founds his judgment on the maxim, *in pari delicto melior est conditio possidentis*; from which it may be inferred that it was his lordship's opinion, that, even if the insured had thought proper to rescind the contract before the risk commenced, or, which is the same thing, before the event was known, he could not have recovered back the premium.—Mr. Justice *Buller* takes a different ground; namely, that though an action might have been maintained to recover back the premium, while the contract was *executory*, upon the terms of restoring the underwriter to his original situation; yet, after the risk is run, it is too late to attempt to rescind the contract.

In the case of *Vandyk* v. *Hewet*, which we shall presently have occasion to mention more particularly, the court of King's Bench seems to have adopted the principle upon which Lord *Mansfield* founded his judgment. It would seem, therefore, that Mr. Justice *Buller*'s doctrine would apply only to the case of an insurance without interest, *innocently* made.

If the contract be void, as being a re-insurance, there shall be no return of premium.

Upon the authority of this case it has since been determined, that if the contract be void, as being a re-insurance, within the stat. 19 *G.* II., c. 37, § 4., the the insured shall not be entitled to a return of premium (*a*).

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answer, that it did not apply, as, in that case, the *risk had been run*. But that could not distinguish it from the case before his lordship, because, if these wagers were to be considered as insurances, the risk was over on the first of *April* 1778, five years before the action was brought. Nay, the action was brought on the ground that the plaintiff had won his wager.

(*a*) R. *Andrée* v. *Fletcher*, 3 T. R. 266.

If the insurer could ever have been called upon to pay the sum insured, there shall be no return of premium.

If, under any circumstances, the insurer might, at any time, have been called upon to pay the whole sum insured, the premium is earned, and he shall not be obliged to return any part of it. Therefore, in the case of a valued policy, though the sum in the policy be twice the value of the effects insured, there shall be no return of premium (*b*).

Captors having insurable interest in their prize before condemnation; if they insure, they shall not have a return of premium, though it should be afterwards adjudged no prize.

If the insured have a contingent insurable interest in the thing insured at the time when the policy is effected, and the risk be once begun, there shall be no return of premium, though it should eventually turn out that he had no title to the thing insured. Therefore, the following case will shew, that though the captors of a ship seized as prize have an insurable interest therein before condemnation; yet, should the ship afterwards be adjudged to be no prize, and restitution be awarded to the owners, there shall be no return of premium, if the risk was commenced.

Boehm and others v. *Bell*, 8 T. R. 154.

Three frigates having taken the ship *Westcapelle* off the *Cape of Good Hope*, then bound from *Batavia* to *Boston*, the captors put her under the command of a lieutenant, as prize-master, and on the 30th of *January* 1797, wrote to their agents in *England*, mentioning the capture of the *Westcapelle*, formerly a *Dutch East India* ship, but then navigated under *American* colours from *Batavia*, by the name of the *George* of *Boston*, manned with a crew above two thirds *Dutch*, which they supposed a lawful prize; and stating, that as there was no court of admiralty there, they were under the necessity of sending her to *England* for trial; and then directed an insurance for that voyage to be made on the ship and cargo, to the amount of 40,000l. (though the estimated value was 150,000 l.) which the agents in *England* accordingly caused to be effected at a premium of 20 guineas *per cent.* to return 8l. *per cent.* if the ship departed from the *Cape* or *St. Helena*, with convoy for *England*, and arrived. The ship sailed from the *Cape* with convoy for *St. Helena*, where she arrived, and sailed from thence for *England*, without convoy, and

(*a*) 2 *Magens*, 137.

arrived

arrived in ſafety in the *Thames* on the 7th of *Auguſt* 1797. But the court of admiralty 'declared the ſhip and cargo to 'be *American* property, and decreed them to be reſtored, 'except the part claimed by the chief mate, who was pro-'nounced to be an enemy, and his property on board con-'demned as lawful prize.' The ſhip and cargo, except the part of the chief mate, were reſtored accordingly. After this ſentence, the plaintiffs brought an action againſt the defendant, to recover 18l. 19s. 10d. *per cent.* as a proportion of the premium to be returned, in reſpect of the ſhip and ſuch part of the cargo as had been decreed to be reſtored. Upon the trial of the cauſe, the jury found a verdict for the plaintiffs, ſubject to the opinion of the court upon a caſe, which ſtated the above facts. —When the caſe came before the court, the defendant inſiſted that the inſured had an inſurable intereſt to the amount of the ſum inſured, and, in the event of a loſs, might have recovered againſt the inſurers. That the fallacy of the plaintiff's argument aroſe from not diſtinguiſhing between an *inſurable intereſt* and an *abſolute indefeaſible property*. That the inſured had the poſſeſſion of the thing inſured, together with a contingent intereſt in the event of its being condemned; beſides, they had an immediate intereſt in the ſubject matter, ariſing out of their reſponſibility for the care and ſafety of the ſhip; for in caſe of groſs negligence or miſconduct, the court of admiralty would adjudge a compenſation to the owners in damages; and if, in any event, the inſurers might have been anſwerable, there could be no return of premium. 2dly. That this being a valued policy, made *bonâ fide*, without any intention of fraud, and the inſured having an indiſputable intereſt, the extent of the intereſt was immaterial. 3dly, That as this was an inſurance on foreign ſhips, it was not neceſſary that the inſured ſhould have any intereſt at all, it not being within the ſtat. 19 *G.* II., c. 37.—The court were clearly of opinion, that the inſured had an inſurable intereſt, and that the riſk having been run, there could be no return of premium.—Lord *Kenyon* ſaid,—" I will not enter into a diſcuſſion of either of the two laſt points made by the defendant's

defendant's counſel, becauſe the firſt alone furniſhes, in my opinion, an anſwer to this action.—The real queſtion in this caſe is one of the moſt ſimple that can be ſtated. It is merely this, whether the inſured had or had not *any intereſt*. The captors had the poſſeſſion of the property inſured, and from that poſſeſſion certain rights and duties reſulted. If it were a legal capture, the captors were intitled; if not, they were liable to be called to an account in the court of admiralty, where they might be amerced in damages and coſts. It was important, therefore, to them to take care that there ſhould be ſomething forthcoming to anſwer for the amount of theſe damages."

2. *Where the Inſurance is void, being upon a Trading with the Enemy.*

Though an inſurance to protect a trading with the enemy is void; yet the inſured ſhall not recover back the premium.

It has already been ſhewn that no *Britiſh* ſubject can legally carry on any commerce with the enemies of the ſtate, without the King's licence; and that an inſurance made to protect ſuch a trading is void (*a*). In the following caſe it was determined that the inſured, in ſuch an inſurance, cannot recover back his premium: And though this was after a loſs had happened, it was after the inſurers had availed themſelves of the illegality of the contract to avoid paying the loſs, and it was founded upon the ſame principle upon which Lord *Mansfield* founded his judgment in the caſe of *Lowry* v. *Bourdieu* (*b*), which would have ſupported the deciſion in that caſe, even if the action had been brought while the contract was executory.

Vandyk and others v. *Hewit*, 1 *Eaſt* 96.

An inſurance was made on goods at and from *London* to *Embden* or *Amſterdam*, at a premium of ten guineas *per cent.*, to return five upon their arrival at their place of deſtination.—In an action on this policy for a loſs by capture, it was averred in the declaration that the inſurance was made for the benefit of certain perſons therein named.—Upon the trial of the cauſe it appeared that the goods were ſhipped on board a *Pruſſian* neutral veſſel,

(*a*) Vid. ſup. 70.—(*b*) Sup. 551.

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on account, partly of the plaintiffs who were naturalized foreigners reſident in *London*, and partly of certain other perſons, aliens, then reſident in *Holland*. It appearing that the inſurance was intended to cover a trading with *Holland*, that country then being at war with this kingdom, the idea of recovering the loſs was given up on the authority of the caſe of *Potts* v. *Bell* (*a*).—The plaintiffs then contended that they were entitled to recover back the premium, on the ground that the policy never attached, and the riſk had therefore never commenced. And it was compared to the caſe of *Lacauſſade* v. *White* (*b*), in which it was determined that a perſon who has depoſited money upon an illegal wager may recover it back, even after the event is determined againſt him.—Lord *Kenyon*, who tried the cauſe, permitted a verdict to be taken by the plaintiff for the premium, with liberty for the defendant to move to ſet that verdict aſide, and enter a verdict for the defendant.—Upon that motion, the court were clearly of opinion, that the plaintiffs had no right to recover back the premium.—Lord *Kenyon* ſaid;—"There is no diſtinguiſhing this caſe, on principle, from the common caſe of a ſmuggling tranſaction. Where the vendor aſſiſts the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themſelves or the value of them (*c*). Both parties are *in pari delicto*, and *potior eſt conditio poſſidentis*."

If the contract be void, on account of a non-compliance with any warranty, expreſs or implied; as if the ſhip do not ſail on the day preſcribed, or do not depart with convoy; or be not ſea-worthy; and there be no fraud imputable to the inſured; he ſhall be entitled to a return of premium; becauſe the contract never attached, and the riſk, therefore, never commenced. In ſuch caſe,

Where the policy is void, and there is no fraud imputable to the plaintiff, he is entitled to a return of premium.

(*a*) 8 T. R. 548, ſup. 73.—(*b*) 7 T. R. 535. But Vid. 8 T. R. 575, where it was held that if the money depoſited upon an illegal wager be paid over to the winner, it cannot be recovered back.—(*c*) Vid. *Biggs* v. *Lawrence*, 3 T. R. 454. *Clugas* v. *Penaluna*, 4 T. R. 466. *Waymell* v. *Reed*, 5 T. R. 599.

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it is always adviſable for the defendant, in an action on the policy, to bring the premium into court; otherwiſe the inſured will have the advantage of trying the queſtion on the validity of the contract, without the peril of coſts; for, at the worſt, he will be ſure of a verdict for the premium (*a*). And it is not unuſual when the jury have brought in their verdict for the defendant, on the only queſtion ſubmitted to them, for the plaintiff's counſel to claim a verdict for the premium, upon the count for money had and received.

When the plaintiff is entitled to a return of premium, he may claim a verdict for it, even after the jury have delivered their verdict for the defendant, on the principal queſtion.

Indeed it has been the conſtant practice, for the plaintiff's counſel to abſtain from any mention of the premium, where he means to claim a loſs; becauſe, by ſetting up a demand for the premium, he confeſſes a *doubt*, at leaſt, of his being able to ſuſtain his principal claim; and throwing out ſuch a doubt, in a caſe already, perhaps, doubtful, may be very injurious to his client's intereſt. And it may be ſaid, moreover, in favour of this practice, that the defendant may come prepared to diſpute the plaintiff's claim to a return of premium, and may prove fraud, which will not be inconſiſtent with any other defence he may have to make; whereas it often happens that the plaintiff's claim to a return of premium reſts on the very caſe made by the defendant (*b*).

But the court will not, on ſetting aſide a verdict for a loſs, ſubſtitute a verdict for the premium.

If the queſtion of return of premium be not agitated at the trial, and a verdict be taken for the plaintiff for the loſs, ſubject to the opinion of the court upon any point that may be reſerved, and that point be decided againſt the plaintiff; it will be too late then to ſet up his claim to a verdict for the premium; for the court cannot find a new verdict, or ſubſtitute any other ſum in lieu of that which the jury gave in damages (*c*).

3. *When there is Fraud on the one Side or the other.*

If the policy be void for fraud on the part of the inſurer, the premium ſhall be returned.

When the policy is void on account of fraud committed by the inſurer, there can be no doubt but that

(*a*) Vid. inf. ch. 17, § 4.—(*b*) Vid. *Penſon* v. *Lee*, 2 *Boſ.* & *Pul.* 330, in which this queſtion was very much canvaſſed.—(*c*) R. *Neſbit* v. *Whitmore*, 1 *Eaſt* 97, n.

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an action will lie to recover back the premium. As if an insurance be made on a certain voyage, lost or not lost, when the insurer, at the time he enters into the contract, privately knows that the ship is arrived safe; he will be bound to restore the premium (*a*).

Whether this be so, where fraud has been committed by the insured.

But whether the insurer be bound to return the premium in a case where fraud has been committed by the insured, is a question upon which more doubt might be entertained.—On the one hand, it might be contended that as the underwriter receives the premium in consideration of his taking upon himself the risk mentioned in the policy, he can have no right to retain it, if no risk was ever run; and, however improperly or unfairly the insured may have conducted himself, that will not furnish a new consideration to the underwriter, to be substituted in the place of that which was expressed in the policy, so as to enable him to retain the premium.

On the other hand, it might be deemed a sort of solecism in our law, if the insured could, by paying a premium, take the chance of reaping the proposed advantage from a fraudulent insurance; and yet, if detected, he shall be entitled to recover back his premium, and so suffer no loss. It has been said, indeed, that the idea of enriching one man by the punishment of another is a strange one, and somewhat inconsistent with the present notions of criminal justice (*b*).—But this idea is not strange in our law; for it pervades all our statutes in which penalties are given to common informers. It is true that the legislature gives these penalties, not for the sake of enriching the informers, but to tempt them, by the hopes of enriching themselves, to bring offenders to justice. When a penalty is given to the party grieved, it is given for the express purpose of enriching him by the punishment of the wrongdoer. Upon the same principle, a security given to a lender upon an usurious contract is declared void by the stat. 12 *An.*

(*a*) Per Lord *Mansfield*, in *Carter* v. *Boehm*, 3 *Bur.* 1909, sup. 347.—(*b*) *Park* 215.

c. 16,

c. 16, § 1.; and yet the borrower, who is a party to the illegal contract, ſhall never be obliged to repay it. Nor is this principle confined to the ſtatute law; for, by the common law, the vendor of ſmuggled goods ſhall not be allowed to recover the price of them from the vendee, though he be far from innocent of the fraud againſt the revenue *(a)*. Many other inſtances might be adduced from the common law to ſhew that one party ſhall be permitted to enrich himſelf by the puniſhment of another, even where they are both *in pari delicto* *(b)*. And it would ſeem from the opinion of Lord *Mansfield* in *Lowry* v. *Bourdieu (c)*, and that of Lord *Kenyon* in *Vandyk* v. *Hewet* *(d)*, that, in the caſe of a gaming policy, the inſured cannot recover back his premium, even where the riſk has never been commenced. How much ſtronger, in point of juſtice, is the claim of an innocent underwriter to retain the premium of an inſurance, by which the inſured meant to defraud him, and which is ſome ſatisfaction for the riſk he has run, though not an adequate puniſhment of the inſured for the fraud he meditated.

It has been determined that there ſhall be a return, if the contract be void for fraud committed by the inſured.

But reaſonable and juſt as this idea may ſeem, it has not always prevailed. The court of chancery, in two inſtances ordered a return of premium where the policies were declared void for fraud committed by the inſured.

Wittingham v. *Thornburgh*, 2 *Vern.* 206. Pr. in ch. 20.

The firſt of theſe caſes was an inſurance on the life of one *Horwell*, for a year, intereſt or no intereſt. The inſured, in order to draw in ſubſcribers, agreed with one *Marwood*, a neighbour of *Horwell*'s, an eminent merchant who was a leading man in ſuch caſes, to ſubſcribe firſt; but he was to loſe nothing, in caſe *Horwell* died within the year, but, on the contrary, was to ſhare what ſhould be gained by the other ſubſcribers. Upon the credit of *Marwood*'s ſubſcribing, ſeveral others, (who had enquired of him about *Horwell*), ſubſcribed likewiſe. *Horwell* lived but four months; and a bill being brought

(*a*) Vid. 3 T. R. 454; 4 T. R. 466; 5 T. R. 599.—(*b*) Vid. 3 T. R. 454; *Cowp.* 343.—(*c*) Sup. 551.—(*d*) Sup. 557.

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to be relieved againſt the policy, and it appearing that the inſured had no intereſt in the life of *Horwell*, who was in a languiſhing condition at the time the inſurance was effected, the court decreed the policy to be delivered up to be cancelled; but the premium was to be *repaid*, the plaintiff's deducting their coſts thereout.

The other caſe was an inſurance on a ſhip, where the inſured was guilty of a fraudulent concealment, for which the court of chancery ordered the policy to be delivered up to be cancelled; but, in like manner, directed the premium to be *paid back*, and allowed out of the coſts.

De Coſta v. *Scandaret*, 2 P. W. 170. ſup. 351. S. P.

This rule of the court of chancery, was firſt adopted at law, upon the authority of the above two caſes, in an action brought on a policy of inſurance on a ſhip, with a count for money had and received by the defendant to the plaintiff's uſe.—The cauſe was tried under a decree of the court of Chancery, where the inſured, (being then plaintiff), offered to pay back the premium which was 10 l.; but no money was paid into court *in this action*.—There was a verdict for the plaintiff for the 10 l. premium, on the count for money had and received, although the jury found the policy to have been *fraudulent*. In fact, in this caſe, like the laſt, the firſt underwriter was only a decoy-duck to miſlead others, and was not himſelf to be bound by the policy.—But it was agreed to bring before the court this queſtion.—"Whether, upon a policy being found *fraudulent*, the premium ſhould be returned."—In ſupport of the affirmative, the two laſt mentioned caſes were cited on the part of the inſured. On the other ſide was mentioned a caſe of *Rucker* v. *Hollingbury*, before the Maſter of the Rolls, who held an opinion contrary to thoſe caſes.—But Lord *Mansfield* ſaid there muſt have been ſome miſtake in the ſtatement of this caſe; for the practice of the court of Chancery was certainly agreeable to the former caſes: He then enquired whether there was any common law determination to the ſame effect, and it not appearing that there was, he ſaid it was plain what muſt be done in this caſe: For he looked upon the

The ſame doctrine adopted in a court of law.

Wilſon v. *Ducket*, 3 *Bur.* 1361.

offer made by the underwriter's bill in equity to be the same thing as if the money had been *actually* brought into court in the present cause. Therefore the verdict for the plaintiff was set aside, and a verdict entered for the defendant.

It has been said, however, of this case, that a trial being had under a decree of the court of Chancery, and the insurer having there made an offer of returning the premium, the court of King's Bench considered the offer in the same light as if he had paid the money into court, and therefore the question *remained undecided* (*a*). But, from the mode of disposing of this case, it is plain that, if the underwriter had not done what was deemed equivalent to bringing the money into court, there would have been a verdict against him for the premium. The court, therefore, clearly decided that the insured was entitled to a return of premium. And this decision had the more weight as it may be fairly concluded, from the gross misconduct of the insured, and from the expedient adopted by the court to oust him of the costs at law, that this point was decided in his favour with much reluctance.

But the courts now hold a contrary doctrine.

But, be that as it may, Lord *Mansfield*, upon better reflection, saw at length, the impolicy, not to say injustice, of permitting the insured to take his chance of defrauding the underwriters, without the risk of losing even his premium. Therefore, where an action was brought on a policy for a total loss, and it appeared to the satisfaction of the jury, that the plaintiff had given the order to his broker to get the insurance effected, after he had received information of the loss of the ship, the jury found a verdict for the defendant; and Lord *Mansfield*, who tried the cause, said the fraud was so gross, that the plaintiff ought not to recover the premium from the underwriters.

Tyler v. *Horn*, at N. P. after Hil. 1785, *Park*, 218.

The fraud was certainly very gross in this case, but not more gross than in eight of the three preceding cases, which

(*a*) *Park* in index tit. *Return of premium.*

we have cited.—But this important question has been since finally settled in a case which came before the court of King's Bench, and where the fraud had been committed, not by the insured himself, but by his agent; and the whole court were of opinion that, in all cases of *actual fraud*, on the part of the insured, committed either by himself or his agent, the underwriter shall retain the premium.

Chapman and others, assignees of *Kennet* v. *Fraser*, B. R. Tr. 33 *G.* III. *Park*, 218.

Sect. 2.

Where the Risk has not been commenced.

ALL the foreign authors agree that insurance is a conditional contract, that the risk is of the essence of it, and that the premium is the price of the risk to be run: Yet many of them hold that the insured is not permitted to dissolve the contract by his own act; and therefore if he relinquish the intended voyage, the insurer is not bound to return the premium, and that he has even a right to demand it, if it has not been already paid (*a*).—They except only the case where it becomes impossible for the insured to ship the goods, or to cause the ship to proceed on her voyage (*b*).

Foreign authors maintain that the insured can not, by his own act, dissolve the contract, and demand a return of premium.

But

(*a*) An assecurator teneatur restituere pretium, eò quod in navem merces? Videbatur teneri assecurator ad restituendum pretium receptum ob casum illius periculi, tamen in contrarium est notatum, quod non solum non teneatur pretium restituere, imo possit petere illud; et ratio est, quia licet emptio periculi non teneat in præjudicium promissoris, tamen in ejus favorem, et in præjudicium assecurati falsa assertio bene tenet. Sic etiam quia illa causa cessat, facto domini mercium, eò quod nullas merces misit in navem, et non facto assecuratoris, per quem non stetit. *Roccus*, h. t. not. 11, 13, 14, 82, 88; vid. *Santerna*, part. 3, n. 109 to 121; *Straccha* gl. 6. *Casaregis*, disc. 1, n. 53, 58.—(*b*) In casibus in quibus impeditur navigatio, putà si navis sit combusta in portu, vel destructa, vel res eam capiat pro necessitatibus publicis, et impeditur conditio assecurationis; quia tunc non posset imputari conditionis defectus magis uni, quam alteri parti, nullus tenebitur; et pretium periculi

In *Holland* and *France*, the law is different.

But the rules which prevail in *Holland* and *France* are more conformable to the nature of the contract of inſurance. In *Holland*, if the goods inſured ſhould not be ſhipped, or ſhould appear to be of leſs value than the ſum inſured, the inſured may, in the one caſe, demand a return of the whole premium, in the other, a return for what is over-inſured (*a*).—In *France*, if a ſtop be put to the voyage before the ſhip ſails, *even by the act of the inſured*, the inſurance becomes void, and the inſurer ſhall return the premium (*b*).

In *England* it is a general rule that if the riſk be not begun, to whatever cauſe this be owing, the premium ſhall be returned.

In *England*, the rule is, that where the riſk has not been begun, whether this be owing to the fault, pleaſure, or will of the inſured, or to any other cauſe, the premium ſhall be returned. The reaſon is, that a policy of inſurance is a contract of indemnity; the underwriter receives the premium for running the riſk of indemnifying the inſured; and therefore if he do not run the riſk, to whatever cauſe this may be imputable, the conſideration for which the premium was paid to him fails, and he ought to return it (*c*).

But where the voyage and premium are diviſible, and any part not begun, the premium for that part ſhall be returned.

But if the inſurance be upon a voyage which is diviſible into ſeveral diſtinct riſks, and which are, in effect, ſeveral diſtinct voyages, the premium may be apportioned according to theſe ſeveral riſks; and in caſe one or more of theſe riſks ſhould not have been commenced, the proportion of premium applicable to thoſe parts ſhall be returned.

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riculi non poteſt peti, et ſolutum repetitur, quaſi cauſâ non ſecutâ. *Roccus*, h. t. not. 15, 56.—Si, ex aliquo impedimento, aſſecuratus non potuiſſet merces ſuas onerare, tunc contractus aſſecurationis locum non haberet; ita ut ſi pretium aſſecurationis fuiſſet ſolutum, repeti certo poterit per aſſecuratum. *Caſaregis* diſc. 1, n. 182, diſc. 62, n. 4. Vid. *Le Guidon*, ch. 9, art. 16, which is nearly to the ſame effect. Vid. Ord. of *Antwerp*, art. 16. 2 *Magens* 27. *Locennius*, lib. 2, ch. 5, n. 16.—(*a*) Ord. of *Amſterdam*, art. 23, 2 *Mag.* 136.—(*b*) Ord. of *Louis* XIV. h. t. art. 37. Vid. *Emerig.* tom. 2, p. 154. *Pothier*, h. t. n. 178, 179.—(*c*) Per Lord *Mansfield*, in *Tyrie* v. *Fletcher*, *Cowp.* 668.

Thus;

Thus:—A ſhip was inſured, "At five guineas *per* "*cent.* loſt or not loſt, at and from *London* to *Halifax*, "warranted to depart with convoy from *Portſmouth* for "the voyage."—Before the ſhip arrived at *Portſmouth*, the convoy was gone. Notice of this was immediately given to the underwriters, who were deſired, either to make the long inſurance or return part of the premium. They refuſed, and the inſured brought an action to recover a part of the premium. At the trial, a caſe was reſerved for the opinion of the court, ſtating the above facts, and alſo ſtating, that the jury found that the uſual and ſettled premium from *London* to *Portſmouth* was one and one-half *per cent.* which the plaintiff offered to allow the the defendant to retain; and that it was uſual for the underwriters, in ſuch caſes, to return part of the premium: But the *quantum* was uncertain, and muſt in its nature be ſo; becauſe it depended upon uncertain circumſtances.—Upon this caſe, the court were unanimouſly of opinion that the plaintiff was entitled to recover.—Lord *Mansfield* ſaid,—"Theſe contracts are to be taken with great latitude: The ſtrict letter is not ſo much to be regarded as the object and intention of the parties. Equity implies a condition that the inſurer ſhall not receive the price of running a riſk, if he runs none. The premium is without conſideration, as to the voyage from *Portſmouth* to *Halifax*; and then this caſe is within the general principle of actions for money had and received. I do not go upon the uſage, which is only that, in like caſes, a *part* of the premium is returned, without aſcertaining *what* part. If the riſk be not run, though it be by neglect, or even the *fault*, of the inſured, yet the inſurer ſhall not retain the premium. It has been objected that the voyage being begun, and part of the riſk already run, the premium cannot be apportioned: But I can ſee no force in this. This is not a contract ſo entire that there can be no apportionment: For there are two parts in it, and the premium may be divided into two diſtinct parts relative, as it were, to two diſtinct voyages. The practice ſhews that it has been uſual, in ſuch caſes, to return a part of

A ſhip is inſured at and from *London* to *Halifax*, warranted to depart with convoy from *Portſmouth*, at five guineas *per cent.* On her arrival at *Portſmouth*, ſhe finds the convoy gone. Notice of this is immediately given to the inſurer.—The premium ſhall be apportioned.

Stephenſon v. *Snow*, 3 *Bur.* 1237.

the premium, though the *quantum* be not ascertained: And indeed the quantum must vary as circumstances vary. But though the *quantum* has not been ascertained, yet the principle is agreeable to the general sense of mankind."—Mr. Justice *Denison*, and Mr. Justice *Eyre*, concurred in this opinion.—Mr. Justice *Wilmot* said,—"The usage to return a part of the premium, in such cases, is a strong proof of the equity of the thing; and nothing can be more just and reasonable. If the risk be once begun, the insured shall not deviate or return back, and then say, I will go no further under this contract, but will have my premium returned. Upon this policy, there are two distinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made, the other was not at all entered upon, nor was the risk ever begun (*a*)."

In the following case, though the facts did not enable the court to pronounce any definitive judgment upon this point; yet, in sending it back to a new trial, an opinion was delivered which tends to strengthen the authority of the above decision.

A ship is insured from *Hull* to *Bilboa*, warranted to depart from *England* with convoy. The voyages from *Hull* to *Portsmouth*, the place of rendezvous, and from *England*, thence to *Bilboa*, may be considered as distinct.

An insurance was made on the ship *Manning*, "At "and from *Hull* to *Bilboa*, warranted to depart from *En-* "*gland* with convoy."—The ship sailed from *Hull* to *Portsmouth*, and from thence departed with a convoy; but this not being direct for *Bilboa*, she left it, and was afterwards captured.—In an action on this policy, upon the above facts coming out in evidence, the plaintiff would have been nonsuited; but his counsel insisted that he was entitled to a return of premium; and there being a count in the declaration for money had and received, and

(*a*) Vid. Lord *Mansfield*'s observations on this case (*Cowp.* 569. *inf.* 575.), in which he labours to vindicate the decision of it, by shewing that the grounds of it were that the voyage was in fact *two voyages*, and that the contract comprised *two distinct conditions*. Vid. also the observations on this and the other cases on this point. 1 *Pul.* & *Bos.* 174.

no money paid into court, a verdict was given for the plaintiff for the whole premium.—Upon a motion to set aside this verdict and enter a nonsuit, it was contended on the part of the defendant, that as the risk had commenced, the plaintiff could not be entitled to any return of premium. —On the part of the plaintiff, it was insisted that there were two distinct voyages in this case; the one from *Hull* to the place of rendezvous, and the other from thence to *Bilboa*, the port of discharge; that the risks were of different natures, one being without, the other with, convoy; and that, as the latter was never begun, the plaintiff must at all events be entitled to return a proportion of the premium on that account.—The court directed the verdict to be set aside, and granted a new trial, being of opinion that if the underwriters were not entitled to retain the whole premium, yet, having ran the risk from *Hull* to *Portsmouth*, they were at least entitled to retain a proportion of it, if, upon a further investigation, it should turn out that the voyage was divisible, and that the premium in such cases had ever been apportioned (*a*).

and in case the ship sails without convoy and is taken, the premium may be apportioned, and a part returned.

Rothwell v. Cooke, 1 *Pul. & Bos.* 172.

Yet, where an insurance is made on a ship, "*at and from*" her port of departure, and warranted to sail on or before a given day, and the ship does not sail within the time required by the warranty, by which the insurer is discharged, it has been holden that the risk at and from the port of departure is entire, and not divisible into two distinct risks, and therefore the premium cannot be apportioned so as to entitle the insured to any return.

Yet, upon an insurance "*at and from*" a place, the risk is not divisible.

Thus, A ship was insured "At and from *Jamaica* to "*Liverpool*, warranted to sail on or before the first of "*August*; premium twenty guineas *per cent.* to return "eight, *if she sailed with convoy.*"—The ship did not sail till *September*, and was lost in the voyage.—The warranty, as to the time of sailing, not being complied with, the

A ship insured "at and from Jamaica to Liverpool, warranted to sail on or before the first of *August*; premium 20 guineas *per cent.* to return 8 guineas if she sailed with convoy." She did not sail till *September*. The insured shall only be entitled

(*a*) This upon memory, seems to be the result of what was done by the court, though not fully expressed in the printed report.

to 8 guineas *per cent.* for convoy, and not to an apportionment of the reſt of the premium.

Meyer v. *Greg-ſon*, B. R. Eaſt. 24 *G.* III. MS.

underwriters were diſcharged from the riſk after the firſt of *Auguſt*, and an action was brought by the inſured for a return of premium.—The defendant, who was an underwriter for 100 l paid eight guineas into court, being the ſum to be returned, if the ſhip ſailed with convoy.—The jury apportioned the premium, and gave eight guineas more for the riſk from *Jamaica* to *Liverpool*; which they conſidered as not having been commenced; thus allowing four guineas for the riſk "*at Jamaica*."—The defendant moved to ſet aſide the verdict, and enter a nonſuit upon the ground that the riſk was entire, the premium was entire, and the voyage indiviſible.—Lord *Mansfield*, Mr. Juſtice *Aſhurſt*, and Mr. Juſtice *Buller*, (againſt the opinion of Mr. Juſtice *Willes*, who thought with the jury, that the premium ſhould be apportioned), determined that the inſured was not entitled to recover more than had been paid into court, and therefore the rule was made abſolute.—Lord *Mansfield* ſaid,—"It would be endleſs to go into an enquiry about the value of the riſk "*at Jamaica*;" which is different at different ſides of the iſland: The parties divided the riſk, as to convoy; for eight guineas were to be returned if the ſhip ſailed with convoy. Independent of that, it was an inſurance "At and from *Jamaica* to *London*," at 12 guineas *per cent.* with an abſolute warranty to ſail "on or before the 1ſt of *Auguſt*," and nothing is ſaid from whence it can be inferred that it was meant that there ſhould be two riſks, or by which the riſk at *Jamaica* could be diſtinctly eſtimated (*a*)."—Mr.

(*a*) Lord *Mansfield*, in delivering his opinion in the caſe of *Tyre* v. *Fletcher*, *Cowp.* 670, inf. 574. ſeems to have entertained a different ſentiment on this point. He then inclined to think that if the words of the policy were "*at and from*, provided the ſhip ſhall ſail on or before the 1ſt of *Auguſt*," it would fall within the reaſoning of *Stevenſon* v. *Snow*, and that there would then be two parts, or contracts, of inſurance, with diſtinct conditions. But this can only be conſidered as an extra-judicial opinion expreſſed very doubtfully.

Juſtice

Upon an insurance *at and from* a place, an usage should be proved to warrant a division of the risk.

Justice *Buller* said,—"As the parties have not considered it as two risks, nor estimated the risk "*at Jamaica*," neither the court or jury have any right to do it for them. In all the insurances from *Jamaica*, the policy runs "*at and from*;" and though, in many instances, the voyage has not been commenced, yet there never was an idea of any part of the premium being returned; and no usage to do so has been found by the jury."

In a subsequent term the following case came before the same court; and though the point was not decided by the judges, yet Lord *Mansfield*, in directing a new trial, laid down the principle, which he conceived ought to govern these cases, in terms which seem more reconcileable to the case of *Stevenson* v. *Snow* (*a*) than to the last cited case of *Meyer* v. *Gregson*.

A ship insured at and from Jamaica to *London*, warranted to sail with convoy, arrives too late at the place of rendezvous for the convoy, but follows and overtakes them: Whether there shall be a return of premium.

A ship was insured, "*At and from* any port or ports "in *Jamaica* to *London*, following and commencing from "her first arrival there; warranted to sail with convoy "for the voyage, from the place of rendezvous."—The ship did not get time enough to the place of rendezvous to sail with the convoy,—but sailed after, and overtook them; so that the warranty was not complied with, and the underwriters were discharged from the time of the ship's sailing.—The insured brought an action to recover back a part of the premium for the voyage *from Jamaica*.—At the trial, an usage seemed to have been proved that when the ship was not out of the port of *Jamaica*, the allowance was one-half *per cent.* In other cases it was arbitrary, and two or three *per cent.* was reasonable. There was a verdict for the plaintiff.—Upon a motion for a new trial, the counsel differed as to the facts that were in evidence, and the cause was sent back to a new trial, without the question of law having been much discussed.—Lord *Mansfield*, however, said, that where there is a *contingency* in the voyage, the risk may be divided. That the reason why there are not two policies in such cases was, that the risk "*at*," is capable of exact

Gale v. *Machell*, B. R. Hil. 25 *G.* III.

Where there is a contingency in the voyage, the risk may be divided.

(*a*) Sup. 565.

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computation. He ſaid the former caſes upon this point were contradictory.

In the ſame term in which this laſt caſe came before the court of King's Bench, the following caſe alſo came before that court: And though the judges there ſeem to have laid great ſtreſs on the uſage found by the jury, to return the premium, deducting one half *per cent.* upon inſurances, at and from *Jamaica*, with a warranty to depart with convoy, or to ſail on or before a certain day, and the warranty is not complied with; and though it is diſtinguiſhed from the caſe of *Meyer* v. *Greg ſon* on this ground; yet it cannot be denied that the authority of the caſe of *Meyer* v. *Greg ſon*, is greatly ſhaken by the caſe I allude to.

Goods are inſured "At and from *Jamaica* to *London*, warranted to depart with convoy before the 1ſt of *Auguſt*." The ſhip ſails before the day, but without convoy. There is an *uſage*, that in ſuch caſes the premium ſhall be returned, deducting ½ *per cent.* for the riſk *ad.* The inſured ſhall recover the reſidue of his premium.

Long v. *Allen*, B. R. Eaſt 25 *G.* III. MS.

That was the caſe of an inſurance on goods, "At and "from *Jamaica* to *London*, warranted to depart with con- "voy, for the voyage, and to ſail on or before the firſt "of *Auguſt*, at a premium of 12 guineas *per cent.* The ſhip ſailed from *Jamaica* to *London* on the 31ſt of *July*, but without any convoy; whereby the underwriters became diſcharged from the remaining riſk. An action was brought for a return of premium. The jury found a verdict for the plaintiff ſubject to the opinion of the court on the above facts; in addition to which, they found 'that it was the conſtant and invariable uſage in 'inſurances, at and from *Jamaica* to *London*, *warranted* 'to depart with convoy, or, to ſail on or before a certain day, to 'return the premium, deducting one half *per cent.* if the 'ſhip ſailed without convoy, or after the day preſcribed.' —Upon this caſe, the court determined that the plaintiff was entitled to recover according to the uſage proved.—Lord *Mansfield* ſaid,—"The law is clear, that if the riſk be commenced, there ſhall be no return of premium. Hence queſtions ariſe of *diſtinct* riſks, inſured by one policy. My opinion has been to divide the riſks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has always leaned againſt them. But where an expreſs uſage is found by the jury, the difficulty is cured."—Mr. Juſtice *Buller* ſaid;—"The counſel for the defendant did right to make the chief queſtion, whether any evidence of this uſage ought

ought to have been received. In mercantile cases, from Lord *Holt*'s time, and in policies of insurance in particular, a great latitude of construction, as to usage, has been admitted. By usage, places come within the policy which are not within the words: Usage explains, and even controls the policy. The usage here found by the jury is universal; and though, in some cases, one half *per cent.* is a small premium for the risk *at*; yet the underwriters are aware that it is so, and no inconvenience can result from it. In *Meyer* v. *Gregson*, no usage was found."

But if the risk be entire and be once commenced, there shall be no return.

But if the risk be entire, and be once commenced, it is a general rule that there shall be no return of premium. And the shortness of the time when the thing insured was put in risk, affords no ground for a return of any part of the premium; which becomes the absolute property of the insurer, the moment the risk commences, though it should cease the moment after. This is one of the favourable circumstances which compensate the insurer for the accidents to which he is exposed. It is impossible to apportion the premium to the duration of the risk, which may be greater in the first hour than in the rest of the voyage (*a*). Therefore if the ship get under weigh and sail on the voyage insured, the premium is acquired, though she return the same instant and wholly abandon the voyage. So if the ship deviate from the voyage insured the next hour after she sails; though this discharges the insurers, yet the risk having been commenced, there shall be no apportionment, or return of any part of the premium in respect of the diminution of the risk.—The following case will shew that though the voyage be to several different places, and consist of several different distinct parts; yet, if in fact it be *one entire risk*, for *one entire premium*, and not several distinct risks, there shall be no apportionment or return of the premium on account of any contingency which puts an end to the

(*a*) Vid. *Emerig.* tom. 1, p. 62, 63. *Pothier*, Vol. 1. n. 179.

contract before the commencement of any part of the voyage insured (*a*).

A ship is insured "At and from *A.* to *B.* during her stay at *B.* and from thence to her port of discharge at *C.* and at and from *C.* back to *A.*" The ship is taken before she arrives at *C.* There shall be no return of premium for the voyage from *C.* to *A.* this being one entire risk and one voyage.

Berman v. *Woodbridge*, *Doug.* 751.

An insurance was made on a *French* ship and her cargo, "At and from *Honfleur* to the coast of *Angola*, during "her stay and trade there, at and from thence to her "port or ports of discharge in *St. Domingo*; and at and "from *St. Domingo* back to *Honfleur*; *at a premium of* "*eleven per cent.*"—The ship sailed to *Angola*, and from thence, after staying some time there, to the *West Indies*. On her way from *Angola*, she put into *Cayenne*, on the coast of *America*, and from thence went to *Martinico*, confessedly out of the course to *St. Domingo*, where the captain was obliged to dispose of his cargo. The ship sailed for *Honfleur*; but was taken by a privateer on her voyage thither. As the deviation discharged the underwriters from the loss, the only question was, whether there should be a return of part of the premium. On the part of the plaintiff it was contended, that the voyage insured consisted of three distinct parts or voyages; viz. from *Honfleur* to *Angola*, from *Angola* to *St. Domingo*, and from *St. Domingo* to *Honfleur*; and that, as this last voyage had never been commenced, the premium ought to be apportioned, and the part of it returned which was paid to insure the risk from *St. Domingo* to *Honfleur*.—But the jury, upon that point, were clear that there ought to be no return.—Lord *Mansfield*, who tried the cause, upon turning the question in his mind, entertained some doubts upon it, and desired that a new trial might be moved for upon that ground.—This being done, the court, upon great consideration, determined that this was one voyage, and one entire risk; and that there could be no return of premium.—Lord *Mansfield*, in delivering the opinion of the court on this point, said;—"On the fullest

(*a*) By the ordinance of *Louis* XIV. h. t. art. 6, if an insurance be made on the outward and homeward voyage, at an entire premium, and the ship arrive at her outward port of destination, but never returns, the insurer shall return one third of the premium.

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consideration, and after looking into all the cases, (though my opinion has fluctuated), we are now all clearly of opinion that there ought not to be any return. The question depends upon this: Whether the policy be upon one entire risk on one voyage, or whether it is to be split into six different risks; for by splitting the words, and taking *at*, and *from*, separately, it will make six. The principles are clear. When the risk has never begun, there must be a return of premium; and if the voyages in this case are distinct, the voyage from *St. Domingo* to *Honfleur* never began. On the other hand, if the risk has once begun, you cannot sever it, and apportion the premium. In an insurance upon a life, with the common exception of *suicide and the hands of justice;* if the party commit suicide, or be executed in twenty-four hours, there shall be no return. The case is the same if a voyage insured be once begun. Is this one entire risk? The insured and insurers consider the premium as an entire sum for the whole, without division.—It is estimated on the whole at eleven *per cent.*, and which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, which happening, or not happening, is to put an end to the insurance. The argument must be, that if the ship had been taken between *Honfleur* and *Angola*, there must have been a return. By an implied warranty, every ship must be sea-worthy when she sails on the voyage insured; but she is not necessarily to continue so throughout the voyage; so that, if this be one entire voyage, if the ship was sea-worthy when she left *Honfleur*, the underwriters would have been liable though she had not been so at *Angola*, &c. but according to the construction contended for on the part of the plaintiff, she must have been sea-worthy, not only at her departure from *Honfleur*, but also when she sailed from *Angola*, and when she sailed from *St. Domingo*. The cases of *Stevenson* v. *Snow* (*a*),

The premium being entire, is a proof that the risk is entire.

(*a*) Sup. 565.

and

and *Bond* v. *Nutt* (a), were quite different from this. They depended on this, that there was a contingency ſpecified in the policy, upon the not happening of which the inſurance would ceaſe. In *Stevenſon* v. *Snow*, it depended on the contingency of the ſhip ſailing with convoy from *Portſmouth*, whether there ſhould be an inſurance from that place or not. This neceſſarily divided the riſk and made two voyages. In *Bond* v. *Nutt*, it was held that there were two riſks upon the ſame principle. "At *Jamaica*," was one. The other, viz. "From *Jamaica*," depended on the contingency of the ſhip having ſailed "*on or before the firſt of Auguſt.*" That was a condition precedent to the inſurance on the voyage *from Jamaica to London*. The two caſes of *Tyrie* v. *Fletcher*, and *Loraine* v. *Thomlinſon*, are very ſtrong; for, if you could apportion the premium in any caſe, it would be in inſurances *on time*."

When the inſurance is for a *term*, and the premium is entire, if the riſk be begun, there ſhall be no return.

So, where the inſurance is for a term ſpecified in the policy, and for one entire premium; if the riſk be begun, and an event happen immediately after which determines the contract, there ſhall be no return of premium.

A ſhip, inſured for 12 months and warranted free from capture, is captured within two months.—There ſhall be no return for the reſidue of the time.

Thus—A ſhip was inſured, "At and from *London*, "to any port or place whereſoever, or whatſoever, for "*twelve months*, from the 10th of *Auguſt* 1776, war- "ranted free from capture or ſeizure by the *Americans*". The premium was 9*l. per cent.* The ſhip was taken by an *American* privateer, about *two months* after the ſaid. —The inſured brought an action to recover a proportion of the premium for the reſidue of the time.—The court determined that the riſk was *entire*; and, having been once begun, there could be no return of any part of the premium. Lord *Mansfield* ſaid,—"This caſe is ſtript of every authority. There is no caſe, or practiſe in point; and therefore we muſt argue from general principles applicable to policies of inſurance. And I take it there are two general rules eſtabliſhed, applicable to this queſtion. The *firſt* is, that where the riſk has not been

Tyrie v. *Fletcher*, *Cowp.* 666.

(a) Sup. 255.

run,

run; whether this be owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity; the underwriter receives a premium for running the risk of indemnifying the insured; and, to whatever cause it be owing, if he does not run the risk, the consideration, for which the premium was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the risk has once commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage; yet, if it was commenced, though it be only for 24 hours or less, the risk is run; the contract is for the entire risk; and no part of the consideration shall be returned; and yet it is as easy to apportion for the length of the voyage, as it is for the time. If a ship had been insured to the *East Indies*, agreeably to the terms of the policy in this case, and had been taken 24 hours after the risk was begun, by an *American* captor, there is not a colour to say that there should have been a return of premium. So much, then, is clear; and indeed perfectly agreeable to the ground of determination in *Stevenson* v. *Snow* (a). For, in that case, the intention of the parties, the nature of the contract, the consequences of it, spoke manifestly *two* insurances, and a *division* between them. The first object of the insurance was from *London* to *Halifax*. But if the ship did not depart from *Portsmouth* with the convoy specified, then there was to be no contract from *Portsmouth* to *Halifax*. The parties, then, have said, "We "make a contract from *London* to *Halifax*; but, on a cer"tain contingency, it shall only be a contract from *Lon*"*don* to *Portsmouth*."—That contingency not happening, reduces it, in fact, to a contract from *London* to *Portsmouth* only. The whole argument turned upon that distinction, and all the judges, in delivering their opinion, lay the stress upon the contract comprising *two distinct conditions*, and considering the voyage as being, in fact,

(a) Sup. 565.

two

two voyages: And this was the equitable way of conſidering it; for though it was at firſt conſolidated by the parties, there was a defeaſance afterwards, though not in words. I think Mr. Juſtice *Wilmot* put it particularly on that ground; but that was the opinion of the court. There was an uſage alſo found by the jury in that caſe, that it was *cuſtomary* to return a proportionable part of the premium in ſuch caſes, but they could not ſay *what* part. The court rejected this, as a void *uſage*, for the uncertainty; but they argue from it, that there being ſuch a cuſtom, plainly ſhewed the general ſenſe of the merchants, as to the propriety of returning a part of the premium in ſuch caſes: And there can be no doubt of the reaſonableneſs of the thing. There has been an inſtance put where the meaſure is by *time*, which ſeems to me to be very ſtrong, and appoſite to the preſent caſe; and that is, an inſurance upon a man's life for twelve months: There can be no doubt but the riſk there is conſtituted by the meaſure of time, and depends entirely upon it; for the inſured would demand double the premium for *two* years that he would take to inſure the ſame life for *one* year only. In ſuch policies there is a general exception againſt ſuicide.—If the perſon put an end to his life the next day, or a month after, or at any other period within the twelve months, there never was an idea that part of the premium ſhould be returned. A caſe of general practice was put by Mr. *Dunning*, where the words of the policy are, "At and from *provided* the ſhip "ſails on or before the firſt of *Auguſt* (*a*); and Mr. *Wallace* conſiders, in that caſe, that the whole policy would depend upon the ſhip's ſailing before the ſtated day. I do not

If a man's life be inſured for 12 months, with an exception of ſuicide, and he kill himſelf the next day; there ſhall be no return.

If an inſurance be '*at and from*,' *provided* the ſhip ſails on or before ſuch a day:—Whether this be two riſks, or only one entire riſk.

(*a*) It muſt be owned that the caſe thus put has much of ſubtlety in it. One part of it ſeems repugnant to the other. Mr. *Wallace* appears to have given it the beſt anſwer it would admit of. The word *provided* makes the ſailing on or before the firſt of *Auguſt* a *condition* upon which the contract is to take effect; and if this be ſo, the word "*at*" in the policy is quite nugatory.

not think ſo. On the contrary, I think, with Mr. *Dunning*, that cannot be. A loſs in port, *before* the day appointed for the ſhip's departure, can never be coupled with a contingency *after* the day: But if a queſtion were to ariſe about it, as at preſent adviſed, I ſhould incline to be of opinion, that it would fall within the reaſoning of *Stevenſon* v. *Snow*; and that there were two parts, or contracts, of inſurance, with diſtinct conditions: The *firſt* is, 'I inſure the ſhip in port, provided ſhe be loſt 'before the firſt of *Auguſt*:' And, *ſecondly*; 'If ſhe ſhould 'not be loſt in port, I inſure her then, during her voy-'age, from the firſt of *Auguſt*, till ſhe reach the port 'ſpecified in the policy.' The loſs in port muſt happen before the riſk upon the voyage could commence; and *vice verſa*, the riſk in port muſt ceaſe the moment the riſk upon the voyage began (*a*).—Let us ſee, then, what the agreement of the parties is, in the preſent caſe. They might have inſured from two months to two months; or in any leſs or greater proportion, if they had thought proper ſo to do: But the fact is, that they have made no *diviſion of time* at all; but the contract entered into was one entire contract from the 19th of *Auguſt* 1776, to the 19th of *Auguſt* 1777; which is the ſame as if it had been expreſsly ſaid by the *inſured*; 'If you, the underwriter, 'will inſure me for 12 months, I will give you an entire 'ſum; but I will not have any apportionment.'—The ſhip ſails, and the underwriter runs the riſk for *two* months; no part of the premium, then, ſhall be returned.—I cannot ſay, if there had been a recapture before the expiration of the 12 months, that the policy would not have revived."

In the foregoing caſe Lord *Mansfield* intimated an opinion that where the premium is entire, it is one proof

Even if the premium for a year be computed at *ſo much per month*, yet, being a groſs ſum, it is not a monthly inſurance.

(*a*) This extrajudicial opinion, ſeems to have been rather haſtily delivered, or perhaps, not very accurately reported. See the caſe of *Meyer* v. *Gregſon*, ſup. 567. which ſeems to be nearly the caſe put by Mr. *Dunning*, and in which Lord *Mansfield* and the reſt of the judges of the *King's Bench* decided that there ſhould be no return of premium.

that the riſk is meant to be entire. In the following caſe, the court of *King's Bench* carried this idea ſtill farther, and decided that if, upon an inſurance for a year, a groſs premium be given; but it is expreſſed in the policy to be *at ſo much per cent. per month*; this ſhall be deemed only a mode of computing the groſs ſum, and does not make the contract a monthly inſurance.

A ſhip inſured againſt *capture* for 12 months, is *loſt in a ſtorm* within two months. The premium is 9 *per cent.* and expreſſed in the policy to be at the rate of 15 s. *per month*; yet there ſhall be no return of premium.

Loraine v. *Tomlinſon*, Doug. 564.

An inſurance was made on a ſhip againſt capture only, *for twelve months*, in the coaſting trade. The plaintiff underwrote 200 l. In the body of the policy it was ſtated, "That the inſurers confeſſed themſelves paid the "conſideration due to them by the inſured, *at and after* "*the rate of* 15 s. *per cent. per month.*" At the bottom oppoſite the plaintiff's ſubſcription, was written, "Pre-"mium received the 15th of *March* 1779;" and on the back was indorſed,—"*Newcaſtle* 15th *March* 1779, Mr. "*J. G. Thomlinſon*, on his ſhip *Chollerford*, himſelf "maſter, *for twelve months*, in the coaſting trade, at and "between *Leith* and the *Iſle of Wight*, beginning the "13th of *March* 1779, and ending the 12th of *March* "1780."—The premium was, in fact, not paid, it being the uſage in *Newcaſtle* not to pay the premiums at the time of making inſurances, but at certain times afterwards.—The ſhip was *loſt in a ſtorm* within the firſt two months; and the inſured tendered the underwriter 3 l. as the premium for two months.—The underwriter brought his action againſt the inſured to recover the whole premium of 18 l. The defendant pleaded the tender and paid the 3 l. into court.—The jury found a verdict for the plaintiff for the remaining 15 l. ſubject to the opinion of the court, whether he was entitled to his whole premium, or only to the 3 l. tendered, upon a caſe which, in ſubſtance, ſtated the above facts.—The court were clearly of opinion that the plaintiff was entitled to recover the whole premium.—Lord *Mansfield* ſaid,—"This is a mere queſtion of conſtruction, on the face of the inſtrument, and therefore, parol evidence ought not to have been admitted to explain it. It is an inſurance for 12 months, for one groſs ſum of 18 l. They have calculated this ſum to be at the rate of 15 s. *per* month.

But

But what was to be paid down? Not 15 s. for the firſt month, and ſo from month to month; but 18 l. at once. Two caſes have been mentioned. *Stevenſon* v. *Snow* (*a*), was decided on the ground of there being two voyages. *Tyrie* v. *Fletcher* (*b*), is directly in point againſt the defendant." He then repeated the two rules laid down by himſelf in this laſt caſe.

Sect. 3.

Upon the Performance of ſome Stipulation.

IT is frequently agreed between the parties that, upon the happening of certain events, or the performance of certain ſtipulations, the inſured ſhall return a part of the premium; and clauſes to this effect are often inſerted in the policy. If, in ſuch caſe, the event have happened, or the thing ſtipulated have been performed, the inſured ſhall be entitled to the return of premium agreed upon, even though the inſurer be obliged to pay a partial loſs.

If part of the premium is to be returned upon the performance of ſome ſtipulation, this ſhall be returned though the inſurer be obliged to pay a partial loſs.

Thus:—An inſurance was made,—"At and from any "port or ports in *Grenada* to *London*, on any ſhip or ſhips "that ſhall ſail on or between the firſt of *May*, and the "firſt of *Auguſt* 1778, at 18 guineas *per cent. to return* "8 l. *per cent.* if ſails from any of the *Weſt India* iſlands, "with convoy for the voyage, and arrives."—At the bottom of the policy there was written a declaration that it was on ſugars, (the muſcovado valued at 20 l. per hogſhead) for account of L. Q.—The ſhip ſailed with convoy within the time limitted, having 51 hogſheads of muſcovado ſugars on board belonging to L. Q. She arrived ſafe in the *Downs*, where the convoy left her as uſual. She afterwards ſtruck on a ſand bank near *Margate*, and 11 of the 51 caſks of ſugar were waſhed overboard, and the reſt damaged. The ſhip was afterwards got off, and arrived ſafe in the port of *London*. The ſugars ſaved were

Goods are inſured on any ſhip from *Grenada* to *London*, at 18 guineas *per cent.* "to return 8 "*per cent.* if "ſails with con"voy and ar"rives."—The arrival of the *ſhip* is what is meant, and the ſhip having ſailed with convoy, the inſured is entitled to a return of 8 l. *per cent.* on the ſum inſured, notwithſtanding any partial loſs on the goods.

Simond v. *Boydell*, *Doug.* 255.

(*a*) Sup. 565.—(*b*) Sup. 574.

taken out at *Margate*; and after undergoing a ſort of cure by a perſon ſent from town for that purpoſe, they were carried to *London* in other veſſels, and the 40 hogſheads being ſold, produced 340 l. inſtead of 800 l. their valuation in the policy.—An action was brought againſt the underwriters for a return of premium.—The defendant paid into court 8 l. *per cent.* on 340 l. The plaintiffs inſiſted that they were entitled to have 8 l. *per cent.* alſo returned on the valued price of the 11 hogſheads of ſugar, which were loſt, and on the difference between what the remaining 40 hogſheads produced, and their valued price.—At the trial, before Lord *Mansfield*, the plaintiffs had a verdict for their whole demand.—Upon a motion for a new trial the principal queſtion was upon the effect of the word "*arrives.*"—For the plaintiff it was inſiſted that this word related only to the arrival of the *ſhip*. That, in policies of this ſort, the intention is, that the underwriters ſhall take the war riſk upon themſelves; but that, if the veſſel be protected by convoy from *that riſk*, and actually arrives, they ſhall then return as much of the premium as was neceſſary to cover it.—On the other ſide, it was contended, that as the words of the policy muſt be applied to the ſubject matter of the inſurance, which in this caſe was on the goods, not on the ſhip, the return of premium could, at moſt, be only on the value of the ſugars which actually came to *London*; whereas, if the defendant muſt pay the valued amount of the ſugars loſt, and the difference between the valued price and the actual produce of the ſugars ſaved, and alſo return 8 l. *per cent.* upon the whole, the inſured would be conſiderable gainers by the loſs.—The court determined that the arrival of the *ſhip* was what was meant by the policy; and that the plaintiff was entitled to a return of full 8 l. *per cent.* on the ſum inſured, notwithſtanding the partial loſs on the goods.—Lord *Mansfield*, after obſerving how very inattentive thoſe who introduce additional clauſes into policies are to their import, ſaid;—"I do not doubt, however, how we are to conſtrue this policy. Dangers of the ſea are the ſame in peace and war: But war introduces hazards of another ſort, depending on a variety of

Why it is ſometimes provided that a part of the premium ſhall be returned in caſe the ſhip ſails with convoy.

of circumſtances; ſome known, others not, for which an additional premium muſt be paid. Thoſe hazards are diminiſhed by the protection of convoy; and if the inſured will warrant a departure with convoy, there is a diminution of the additional premium. If the inſured will not warrant a departure with convoy, he pays the full premium; and in that caſe, the underwriter ſays: "If it turn out that the ſhip do depart with con-"voy, I will return part of the premium." But a ſhip may ſail with convoy and be ſeparated from it by a ſtorm, or other accident, in a day or two, and loſe its protection. On a warranty to ſail with convoy, that would not be a breach of the condition: But, to guard againſt that, the inſured adds, in policies of the preſent ſort; "The "ſhip muſt not only ſail with convoy, but ſhe muſt *arrive*, "to entitle you to the return." The words, "*and ar-*"*rives*" do not mean that the ſhip ſhall arrive in the company of the convoy; but only that ſhe herſelf ſhall arrive. If ſhe do, that ſhews, either that ſhe had convoy the whole way, or did not want it. But, in the ſtipulation for the return of premium, no regard is had by the parties to the condition of the goods, on the arrival of the ſhip. The conſtruction contended for by the defendant is *adding a comment longer than the text.* If it had been meant that no return ſhould be made, unleſs all the goods arrived ſafe, they would have ſaid; "If the ſhip arrive "*with all the goods*, or, *ſafely with all the goods.*" The total or partial loſs of the goods was the ſubject of the *indemnity*, and muſt be paid for by the underwriter. But, as to the return of the additional premium; whether the goods arrive ſafe or not, makes no part of the queſtion. The ſingle principle which governs is, that, in the events that have happened, the war riſk has been rated too high."

The words "*and arrives*" in the policy only mean that the *ſhip*, not the goods, ſhall arrive.

So, where an inſurance was made on the freight of the ſhip *Jackſon*, "At and from *Jamaica* to *London*, war-"ranted to ſail on or before the 26th of *July* 1796, with "convoy for the voyage, at the rate of 10 guineas *per cent.*

The inſurer on a freight agrees to return part of the premium "if the ſhip ſails with convoy and *arrives.*"—The ſhip having

failed with convoy and arrived, the insured shall have the return, though the ship being captured and recaptured, the underwriters were obliged to pay salvage.

Aguilar and others v. *Rodgers*, 7 T. R. 421.

"*to return* 2 l. *per cent.* if she sailed on or before the "1st of *July* 1796, and arrived."—Afterwards, by a memorandum indorsed on the policy, 15th *August* 1796, and signed by the underwriters, it was agreed, in consideration of 10 guineas *per cent.* additional premium, that the warranty of sailing with convoy should be annulled, and the defendant undertook to return 10 l. *per cent.* "*if the ship sailed with convoy and arrived.*" The ship sailed from *Jamaica* on the 26th of *July*, with convoy, but separated in bad weather, and was captured on the 26th of *October*, recaptured on the 5th of *November*, and carried into *Cork*, where she was delivered up to the owners, on paying 9 l. 14 s. 7 d. *per cent.* for salvage. She afterwards arrived at the port of *London* with her cargo.—In an action on the policy, with counts for a return of premium, the defendant paid into court 19 l. 9 s. 2 d. the amount of the salvage on 200 l. his subscription.—The plaintiffs obtained a verdict for the premium, and, upon a motion to set it aside, the court determined that according to the true construction of the memorandum, the insured in this case was entitled to the return of premium there stipulated.—Lord *Kenyon* said,—"I agree with the defendant's counsel, that every arrival of the ship at her port of destination, would not be an arrival within the fair construction of the memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port; or an arrival at her port in *England*, as the property of other persons after a capture. But, in order to satisfy the memorandum, it should be an arrival at the destined port, *in the course of the voyage*; and, in this case, the ship did arrive at the port of *London*, in the course of her voyage. It is now too late to controvert the authority of *Hamilton* v. *Mendez*, even if we were disposed so to do, which I am not, where it was holden that though the insured may abandon, on hearing of a capture, yet if they do not abandon, and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is 18 years since the case of *Simond* v. *Boydell* (*a*) was decided.

decided. That caſe muſt be well known in the commercial world; and if the parties in this caſe had intended to make an agreement different from that which the words uſed in this memorandum import, they would have added, after "*arrived*," the words "*ſafely from the* "*enemy*" or ſome others to that effect. But the words here uſed are not equivocal, and we ought not to depart from them. It would be attended with great miſchief and inconvenience if, in conſtruing contracts of this kind, we were not to decide according to the words uſed by the contracting parties. On the grammatical conſtruction of the words, which is the ſafeſt rule to go by, I am of opinion that the verdict ought not to be ſet aſide."

A ſhip is inſured at 12 guineas *per cent.* to return 6 l. if ſhe ſail with convoy from the coaſt of *Portugal* and arrive. She ſails under convoy from *Oporto* for *Liſbon*, where the whole trade bound for *England* were to rendezvous, in order to ſail together from thence. The ſhips going from *Oporto* to *Liſbon* being diſperſed in a gale of wind, the ſhip inſured ran for *England* and arrived.—It was determined that this ſailing with convoy from *Oporto* for *Liſbon* was a ſailing with convoy from the coaſt of *Portugal*, ſo as to entitle the inſured to 6 l. *per cent.* return of premium.

If the inſured be entitled to a return of premium in caſe the ſhip ſail with convoy from the coaſt of *Portugal* and arrive; he will be entitled to this, if the ſhip ſail with convoy from *Oporto* for *Liſbon*, to join another convoy there.

Audley v. *Duff*, 2 *Pul.* & *Boſ.* 111. Sup. 289.

Sect. 4.

Of the Deduction of one-half per Cent. upon a Return of Premium.

AS the inſurer can never, by his own act, diſcharge himſelf from the contract, it ſeems but reaſonable that, where the inſured thinks proper to put a ſtop to the adventure, and prevent the riſk from ever commencing,

(*a*) Sup. 579.

he ſhould make ſome compenſation to the inſurer for his trouble and diſappointment; it is therefore the general cuſtom in all the maritime countries of *Europe*, to allow him to retain one half *per cent.* (*a*).—This the *French* denominate *droit de ſignature*. *Pothier* (*b*) thinks it is given to compenſate the inſurer for the loſs he ſuſtains by the non-performance of the contract, by the act of the inſured. *Emerigon* (*c*) ſays it is for his trouble in ſigning the policy, and making the proper entry in his books; and this is the reaſon given in *Le Guidon* (*d*).

It is allowed to the inſurers where the contract is void for ſome radical defect, provided this was unknown to him when he entered into the contract (*e*). But if he was informed of the fault, or muſt have known it before he ſubſcribed the policy; as if he were to inſure a ſhip or goods when he knew of their ſafe arrival, or ſeamen's wages, or contraband goods, knowing them to be ſuch, he could have no claim to this allowance (*f*).

Pothier holds that if the contract become void, not by the act of the inſured, but by ſome cauſe which he could not prevent or control, the inſurer ſhall not be entitled to the half *per cent* (*g*).—*Emerigon*, on the contrary, maintains that in all caſes where the policy becomes void, without any fraud on the part of the inſurer, he ſhall have this allowance (*h*).

(*a*) *Molloy*, b. 2, c. 7, § 12.—(*b*) h. t. n. 181.—(*c*) Tom. 2, p. 168.—(*d*) Ch. 2, art. 16.—(*e*) Ord. of *Antwerp*, art. 14, 2 *Mag.* 27.—(*f*) *Valin* on art. 10, 16, 17; h. t. *Pothier*, h. t. n. 183, *Emerig.* tom. 2, p. 169.—(*g*) *Pothier*, h. t. n. 181.—(*h*) *Emerig.* tom. 2, p. 169. Vid. *Le Guidon*, ch. 2, art. 16, ord. of *Amſt.* art. 22. ord. of *Antwerp*, art. 16, 2 *Mag.* 27, 28.

CHAP.

CHAP. XVII.

Of the Proceedings in Actions on Policies of Insurance.

IN treating of actions on policies of insurance we will inquire,

1. In what courts they may be brought;
2. Of the declaration;
3. Of the plea, and bringing money into court;
4. Of the consolidation rule;
5. Of the trial.

Sect. 1.

In what Courts Actions on Policies of Insurance may be brought.

The courts of common law have the sole jurisdiction in matters of insurance.

Insurance being a marine contract, the law which regulates it, is considered, in most of the commercial states of *Europe*, as a branch of marine law, and therefore, where no commercial tribunal is established, questions arising upon this contract, generally belong to the jurisdiction of the courts of admiralty (*a*). But I do not find that courts of admiralty have ever had jurisdiction in questions of insurance in this country (*b*). In a former part of this work (*c*) I took occasion to observe, that although the modes of administering justice in our courts of common law, are so well suited to the investigation and decision of all commercial questions; yet, that it was not till towards the end of Queen *Elizabeth*'s reign, that actions upon policies of insurance began to be brought in the courts of *Westminster*; and that the legislature, even then, conceiving that questions upon this contract ought not to be litigated in those courts, being governed by cer-

(*a*) Vid. *Emerig.* t. 2, p. 319.—(*b*) For this consult *Zouch* on the jurisdiction of the admiralty.—(*c*) Sup. 24.

tain

tain rules unknown to the common law, erected a court for the ſole purpoſe of determining ſuch cauſes; but that, though the powers of this court were greatly enlarged in a ſubſequent reign, yet, it ſoon fell into diſuſe, and the determination of all queſtions ariſing out of this contract has long ſince excluſively belonged to the courts of common law.

Courts of equity have no juriſdiction in caſes of inſurance

Courts of equity have no more juriſdiction in caſes of inſurance than in thoſe of the pureſt common law cognizance. They do, indeed, ſometimes, in caſes of inſurance, as in all other caſes, interpoſe their authority for the advancement of juſtice. That court will compel a truſtee to permit his name to be uſed by the *cetui que truſt* in an action on a policy of inſurance (*a*); it will iſſue commiſſions for the examination of witneſſes reſiding abroad, or out of the juriſdiction of the court, and grant injunctions to ſtay the proceedings at law till the return of ſuch commiſſions (*b*); it will compel a party charged with fraud to make a full diſcovery upon oath of all circumſtances within his knowledge which may lead to a diſcovery of the real facts of the caſe; and deliver up, or permit an inſpection of, all papers and documents which are material to the matters in diſpute.—But, except in ſuch caſes, it has been ſolemnly determined, that courts of equity have no juriſdiction in queſtions of inſurance (*c*).

The parties cannot, by agreement to ſubmit their differences to arbitration, oust the ſupreme courts of their juriſdiction.

It may be proper, in this place, to mention, that the authority of the ſupreme courts of *Weſtminſter* is ſo tranſcendant, that nothing but the expreſs words of an act of Parliament can take away or abridge their juriſdiction in any caſe (*d*); and therefore a clauſe inſerted in a policy, that, in caſe of any diſpute between the parties, it ſhall be referred to arbitration, is merely nugatory, for

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(*a*) Per Lord *Hardwicke*, Ch. 1 *Atk.* 457.—(*b*) R. *Chitty* v. *Selwin*, 2 *Atk.* 359.—(*c*) R. upon demurrer in Chancery, and confirmed in the Houſe of Lords upon appeal, *De Ghetoff* v. *Lond. Aſſur.* 3 *Bro.* Parl. Ca. 525; Per Lord *Hardwicke*, Ch. 1 *Atk.* 457.—(*d*) 2 *Hawk.* P. C. 285, 2 *Bur.* 1042.

without

without it, the parties may, if they think proper, ſubmit their differences to arbitration; and with it, neither can *compel* the other to do ſo; for the agreement of the parties cannot ouſt the ſupreme courts of their juriſdiction (*a*). If, indeed, an award be actually made, it will be a bar to an action; or if the parties have ſubmitted their differences to arbitration, and the reference be ſtill depending, that, perhaps, may alſo be a bar (*b*).

Sect. 2.

Of the Declaration.

Special *aſſumpſit* is the proper form of action againſt private underwriters.

THE common policy of inſurance, ſubſcribed by private underwriters, being only a written undertaking, not under ſeal, is but a ſimple contract, and therefore aſſumpſit is the proper form of action to be brought upon it, againſt the underwriters. And as the action in ſuch caſe is founded on a particular and expreſs undertaking made upon a conſideration, upon which the law would not, by neceſſary implication, raiſe the promiſe ſpecified in the policy, the plaintiff muſt declare ſpecially upon it.

Heads of the declaration.

In this, like every other caſe of ſpecial *aſſumpſit*, the contract muſt be ſet forth with preciſion; for any material variance or omiſſion will be fatal (*c*).—The declaration muſt therefore recite the policy, (which is alledged to have been made according to the cuſtom of merchants), with ſuch warranties and ſtipulations as may have been introduced into it, with an averment that the defendant had notice of the policy.—It then alledges, that in conſideration that the plaintiff had paid his premium to the defendant, and had promiſed to perform all things on his part to be done, the defendant promiſed to become an inſurer for the ſum ſubſcribed by him, upon the terms mentioned in the policy, and that

(*a*) R. *Kill* v. *Hollifter*, 1 *Wilſ.* 129.—(*b*) Per Cur. 1 *Wilſ.* 129, ſed Q.—(*c*) Vid. *Gilb.* law of evid. 193.

he

he would perform all things, on his part, as to that ſum; and alſo that he had ſubſcribed the policy as an inſurer for that ſum. That the inſured was, at the time of the inſurance, and at the time of the loſs, intereſted in the ſhip or goods inſured, to the amount of the value in the policy, if it be a valued one, or to the amount of the ſums ſubſcribed, if it be an open one. —It then ſtates that the ſhip, &c. on a certain day was in good ſafety at her port of departure; that ſhe ſailed on the voyage inſured within the time mentioned in the policy, if a time be limited for her ſailing; and with convoy, if there be a warranty for her ſo doing;—and it likewiſe avers an exact compliance with every other warranty expreſſed in the policy.—The loſs is then ſtated, which muſt appear to have been occaſioned by ſome of the perils inſured againſt; and this muſt be ſhewn with reaſonable certainty, that the inſurer may have notice of the caſe againſt which he is to prepare his defence.—Notice to the defendant of this loſs, and a demand of the ſum ſubſcribed by him are then averred. And laſtly, the breach of the contract by the non-payment of the ſum ſubſcribed by the defendant.

This is the general outline of a declaration upon a common policy, ſubſcribed by individual underwriters in an ordinary caſe. When there are any particular circumſtances, it behoves the plaintiff to be careful to adapt his declaration to them.—It is uſual to add a count for money had and received by the defendant to the plaintiff's uſe, to enable the plaintiff to recover back his premium, if, under all the circumſtances, he ſhould appear to be entitled to that only.

Count for money had and received.

When a loſs has been adjuſted, and the adjuſtment ſigned by the inſurer in the uſual manner, the inſured, in order to recover this loſs, is not obliged to declare ſpecially upon the adjuſtment as upon a new contract; but may declare upon the policy in the uſual manner, and give the adjuſtment in evidence, which, as we formerly obſerved *(a)*, is equivalent to an admiſſion,

It is not neceſſary to declare ſpecially upon an adjuſtment. The inſured may give it in evidence upon the uſual declaration upon the policy.

(a) Sup. 542.

though

though not concluſive, of all the facts neceſſary to be proved, to entitle the inſured to recover upon the policy *(a)*.

The *averment of intereſt* in the inſured may be either general or ſpecial. Under a general averment of intereſt the plaintiff may give in evidence any intereſt he may have in the thing inſured. But if the intereſt be averred ſpecially, it muſt be proved as ſtated. The general averment is, therefore, in moſt caſes, to be preferred. Nor can I ſee any neceſſity for a ſpecial averment, unleſs the queſtion of intereſt be the only matter in diſpute between the parties, and the plaintiff means to put this upon the record *(b)*.

The averment of intereſt may be either general or ſpecial.

The general averment is ſufficient, not only as to the *title* or *claim* of the inſured, but alſo as to the *quantum of intereſt*. In aſſumpſit the plaintiff recovers damages according to the evidence, *pro tanto*; and, therefore, if he aver intereſt generally, in the entire thing inſured, he ſhall recover for the loſs in proportion to the *quantum* of intereſt he proves *(c)*.

But the general averment is ſufficient not only as to the *title*, but alſo as to the *quantum* of intereſt.

If the inſurance be made in the name of an agent, the action may be brought either in his name or in the name of the principal; and in either caſe it muſt be averred that the policy was made in the name of the agent, as agent, for the uſe of the principal, who is averred to have been intereſted in the ſhip or goods inſured, to the amount of the ſum inſured, or the value in the policy.

If the inſurance be in the name of an agent, it muſt be averred for whoſe uſe.

In averring intereſt in the inſured, it is ſufficient to ſhew it to have been in thoſe who had the property *at the time of making the policy*.—Therefore, where it was averred in the declaration, that *P. Maingy* and *N. Maingy*,

In averring the intereſt, it is ſufficient to ſhew it to have been in thoſe who had the property at the time of making the inſurance.

(a) Per Lord *Kenyon*, at N. P. *Rodgers* v. *Maylor*, ſup. 544. *Perchard* v. *Whitmore*, at N. P. after *Mich.* 1780, 2 *Pul.* and *Boſ.* 155 n.—*(b)* See the caſe of *Crawford* v. *Hunter*, ſup. 85, where the intereſt was ſpecially averred, probably to bring the queſtion of intereſt, which, in that caſe, was a mere queſtion of law, to an immediate deciſion upon demurrer.—*(c)* R. *Riſing* v. *Burnett*, inf.

until,

until, and *at the time of making the policy*, and alſo at the time of the loſs, were intereſted in the goods mentioned in the policy; and that the ſaid inſurance was made for the ſaid *P. M.* and *N. M.*, and for their account. In the courſe of the cauſe it appeared that Mr. *Le Meſurier* had, ſince the policy was effected, become a partner with *P. M.* and *N. M.*, and had taken a ſhare of all the ſtock, *including the goods inſured*. Upon this it was urged on the part of the defendant, that the plaintiff ſhould be nonſuited; for as Mr. *Le M.* was intereſted in the goods inſured, the averment of intereſt in the declaration was diſproved.—But Mr. Juſtice *Buller*, who tried the cauſe, ſaid, he thought the plaintiff ought not to be nonſuited; for that Mr. *Le M.* was not intereſted *at the time of making the policy*, to which the averment of intereſt related, and the plaintiff brought the action for thoſe who were intereſted at the time.

In this caſe it ſeems to have been taken for granted, that if Mr. *Le M.* had been a part owner at the time the policy was effected, the plaintiff muſt have been nonſuited. Yet the following caſe ſhews that, even in that caſe, the averment would be ſufficiently ſupported by the evidence.

A cargo is purchaſed by *A.* who parts with a ſhare in it to *B.*, and afterwards inſures it on his own account; *A.* may aver intereſt in himſelf alone. The fact of *B.*'s having been let into a ſhare in the adventure, does not negative the averment, *A.* having ſtill an intereſt in the entirety of the cargo.

Page v. *Fry*, 2 *Pul.* and *Puſ.* 240.

A policy was effected on a cargo of corn by the plaintiff, as agent to Meſſrs. *Hyde* and *Hobbs*.—In the declaration on this policy, it was averred that *Hyde* and *Hobbs* were, at the time of loading the ſaid corn on board the ſaid ſhip, and at the time of ſubſcribing the policy, and alſo at the time of the loſs, intereſted in the ſaid corn, *to the amount of all the money inſured thereon*, and that the ſaid policy ſo made in the name of the plaintiff, was made for the uſe, riſk, benefit, and account of the ſaid *Hyde* and *Hobbs*.—Upon the trial before Lord *Eldon*, it appeared that after *Hyde* and *Hobbs* had purchaſed the corn on their own account, they, thinking the engagement might be too large for them, offered another houſe a ſhare in the corn, which was accepted: *Hyde* and *Hobbs* having informed the plaintiff of this, directed him to effect the inſurance on the cargo. *Hyde* and

and *Hobbs* paid for the cargo, and invoices were made out to them.—It was objected, on the part of the defendant, that this evidence negatived the averment in the declaration, that the whole intereſt was in *Hyde* and *Hobbs*.—Lord *Eldon*, however, directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonſuit.—Upon that motion, the court were clearly of opinion that *Hyde* and *Hobbs* had an intereſt in the *entirety* of the cargo, ſufficient to ſupport the averment in the declaration, notwithſtanding other perſons had a beneficial intereſt in part.

Whether it be neceſſary to aver intereſt in a caſe not prohibited by the 19 *G.* II, c. 37.

It has been holden *(a)* that before the ſtat. 19 *G.* II., c. 37, inſurances without intereſt were not illegal; and that, before that act, it was unneceſſary to aver intereſt in the inſured in any caſe, and conſequently that ever ſince that act, it is not neceſſary to aver intereſt in any caſe not prohibited by it.

Commiſſioners for the care of foreign ſhips and goods ſeized by the King, may inſure in their own names, and declare on their own intereſt.

Therefore, where commiſſioners, appointed under the ſtat. 35 *G.* III., c. 8, § 21., were authorized to take into their poſſeſſion and care all *Dutch* ſhips and effects brought into, or detained in the ports of *Great Britain*, and to diſpoſe thereof according to ſuch directions as they might receive from the privy council; it was determined that theſe commiſſioners might inſure, in their own names, the ſhips and effects thus put under their care, while they were on their paſſage to this country; and that a count ſtating the nature of their truſt, and averring an intereſt in them, as ſuch commiſſioners, was good.—In the ſame caſe it was alſo determined, that a count averring that the ſhips inſured did not, at the time when the inſurance was effected, *belong to his Majeſty or any of his ſubjects*, was likewiſe good, without any averment of intereſt (*b*).

The loſs muſt be averred to have ariſen from the true cauſe, and no other.

As the fact of the loſs is often the principal matter in diſpute, it is neceſſary to ſtate the true cauſe of it, with reaſonable certainty, that it may appear to be a loſs within the policy, and for which the defendant is liable;

(*a*) Sup. 103.—(*b*) R. *Craufurd* v. *Hunter*, 8 T. R. 13, ſup. 85.

and

and alſo, that he may have notice of the caſe which he is called upon to anſwer.—Therefore, if, in a declaration upon a policy without intereſt, the loſs be averred to have been occaſioned by *capture*, when, in fact, the ſhip was releaſed from the capture, and might have proceeded on her voyage; the inſured cannot recover; for the ſhip might have reached her deſtined port, which was the event inſured.—Had it been a policy *upon intereſt*, the inſured might have abandoned, and then the averment of a loſs by capture would have been good.

A ſhip inſured, intereſt or no intereſt, is captured, but afterwards ſet at liberty in a condition to purſue the voyage inſured; but inſtead of that, ſails on a different voyage, and is loſt. The inſured cannot recover as for a loſs by capture.

Kulen Kemp v. *Vigne*, 1 T. R. 304, ſup. 106.

Therefore where goods were inſured on board the ſhip *Emanuel*, at and from *Falmouth* to *Marſeilles*, *intereſt or no intereſt*, warranted a *Daniſh* ſhip.—In declaring on this policy it was averred that, "Whilſt the ſhip was proceeding in her voyage from *Falmouth* to *Marſeilles*, and before ſhe could arrive at *Marſeilles*, ſhe was captured by the *Spaniards*; and thereby the ſaid ſhip, and alſo the goods and merchandizes on board her, were totally loſt to the plaintiffs."—Upon the trial it appeared, that the ſhip was taken by a *Spaniſh* privateer and carried into *Ceuta*, where ſhe was condemned, but, upon appeal, was afterwards releaſed, and in a condition to purſue her voyage; but inſtead of proceeding to *Marſeilles*, which ſhe might have done, ſhe firſt ſailed to *Malaga* to refit, and from thence ſhe went on a voyage to *Bremen*, and in that voyage was loſt.—On the trial it was objected, on the part of the defendant, that the plaintiffs could not recover upon this form of declaring, for a loſs by *capture*; for though the veſſel was captured, yet having afterwards been reſtored, ſhe might have reached her deſtined port, in which caſe the underwriters would have been diſcharged by the terms of the memorandum; that if this had been a policy upon *intereſt*, the averment that the ſhip was loſt by capture would have been good; becauſe, in that caſe, the inſured might have *abandoned*: But this being a wager policy, and the event inſured againſt being the non-arrival of the ſhip at *Marſeilles*, the inſured could not abandon *(a)*.—Mr. Juſtice *Buller*, who

(a) Vid. *Fitzgerald* v. *Pole*, 5 *Bro.* Parl. Ca. 131. Sup. 504.

tried

tried the cauſe, being of this opinion, nonſuited the plaintiffs.—Upon a motion to ſet aſide this nonſuit, it was contended on the part of the plaintiffs, that the object of the voyage was defeated by the capture; that the moment the voyage was defeated, the inſurers became liable, and after that, it was immaterial what courſe the ſhip took.—But the court adopted the ſame opinion, upon which Mr. Juſtice *Buller* had nonſuited the plaintiffs, and held that this could not be averred to be a loſs by *capture*; becauſe, after the capture, the ſhip might ſtill have proceeded to *Marſeilles*, which was the event inſured.

If rioters board a ſhip and occaſion a *ſtranding*, the loſs cannot be recovered on a count for *detention of people*, or for a loſs by *pirates*, but only upon a count for a loſs by *ſtranding*.

Neſbitt v. *Luſhington*, 4 T. R. 723. ſup. 147, 436.

So, if a mob of rioters board a ſhip, for the purpoſe of obliging the captain to ſell a cargo of corn at an inferior price; and in conſequence of this boarding, the ſhip be ſtranded, and a quantity of the corn loſt: This is a loſs by *ſtranding*, within the uſual memorandum, and, in an action on a policy on the corn, it muſt be ſo laid in the declaration; nor could the inſured recover in this caſe, upon a count for a loſs by *detention of people*; becauſe this mob did not conſtitute *a people* within the meaning of the policy: Neither could the inſured recover for a loſs by *pirates*; becauſe, this being a policy on *corn*, the inſurer was liable for no partial loſs, unleſs it were a *general average*, or the ſhip were ſtranded; and this was not a general average, becauſe the whole adventure was never in jeopardy; for the perſons who took the corn intended no injury to the ſhip, or any part of the cargo but the corn.

If a loſs happen in conſequence of the captain's miſtake, this cannot be declared upon, as for a loſs by the perils of the ſea.

The cauſe of the loſs muſt be ſtated according to the truth of the caſe. The defendant has a right to inſiſt upon this, in order that he may have an opportunity of demurring, or moving in arreſt of judgment, if it be not ſufficiently averred. If, therefore, a loſs happen in conſequence of the captain's miſtaking his courſe, and in the declaration it be alledged that it aroſe from *the perils of the ſea, contrary winds, and other misfortunes*; the plaintiff cannot recover.

The captain of a slave ship mistakes his course, whereby a scarcity of water ensues, and a number of the slaves are thrown overboard to save the rest: It is not sufficient to state in the declaration that, *by contrary winds, currents, &c.*, the ship was retarded, and the slaves perished for want of water.

Gregson v. *Gilbert*, B R. 23 G. III, *Park* 62.

Thus:—In a declaration on a policy *on slaves* it was stated, —"That, by the *perils of the sea, contrary winds, currents,* "*and other misfortunes*, the voyage was so much retarded, "that a sufficient quantity of water did not remain for the "support of the slaves and other people on board, and that "a certain number of the slaves *perished for want of water*." —Upon the trial it appeared that the ship, being bound from *Guinea* to *Jamaica*, had missed the island, and that the crew were reduced to great distress for want of water: That the captain consulted with the crew, and it was unanimously agreed upon, that some of the slaves should be thrown overboard, in order to preserve the rest; and that, at the time this resolution was formed, there remained but one day's full allowance of water at two quarts *per* man. The jury, upon this evidence, found a verdict for the plaintiff, with 30 l. a-head for every slave thrown overboard.—The court, upon a motion, granted a new trial, being of opinion that the declaration did not state the loss according to the truth of the case.—Lord *Mansfield* said,—"This is a very uncommon case, and deserves further consideration. There is great weight in the objection, that the loss is stated in the declaration to have arisen from the *perils of the sea*, and that the currents, &c. had made the ship foul and leaky. Now, does it appear by the evidence that the ship was foul or leaky? On the contrary, the loss happened by mistaking *Jamaica* for another place."—Mr. Justice *Buller* said;—"The declaration does not, in any part of it, state the loss which has been the occasion of this demand; and it would be very mischievous if we were to overturn this objection. Suppose, for a moment, that the underwriters, in some cases, are liable for the *mistake* of the captain; yet, if they are not liable in others, the nature of the loss must be stated in the declaration, that the defendant may have an oportunity of moving in arrest of judgment, if it be not sufficiently alledged. But it would be impossible for the defendant, in this case, to move in arrest of judgment; for the facts of the case, as proved, are different from those stated in the declaration. The point of law in arrest of judgment cannot be argued from the

the facts ſtated on the record; and the declaration in this caſe ſtates the loſs to have happened by the perils of the ſea."

In ſtating the cauſe of the loſs, the beſt way is to alledge it, as nearly as may be, in the words of the policy: As if the loſs be by *barratry*, it ought regularly to be ſtated to have been occaſioned "*by the barratry of* "*the maſter and mariners.*" But it will be ſufficient if it be ſtated in words which import the ſame thing.

But the loſs need not be ſtated in the very words of the policy.

Thus, where it was alledged that, *per fraudem et negligentiam magiſtri, navis prædicta depreſſa et ſubmerſa fuit, et totalitur perdita et amiſſa fuit, et nullius valoris devenit:*— It was objected that this was not within the meaning of the word *barratry*, and that the allegation ſhould have been expreſs, that the ſhip was loſt by the barratry of the maſter; and that, though barratry may import *fraud*, yet it does not import *neglect*.—But the court were unanimouſly of opinion that there was no occaſion to aver the fact *in the very words of the policy*; but if the fact alledged came within the *meaning of the words*, it was ſufficient.

If the declaration alledge the loſs to have happened by the *fraud and negligence* of the maſter; this is a ſufficient allegation of *barratry*.

Knight v. *Cambridge*, 2 Ld. *Ray.* 1349; 1 Str. 581, ſup. 312.

Where ſalvage is to be recovered it is not neceſſary to declare for ſalvage, *eo nomine*. It is ſufficient to ſtate the accident or injury which occaſioned that charge, without ſtating ſpecially the particular circumſtances which led to it.

Where ſalvage is to be recovered, it is ſufficient to ſtate the injury which occaſioned it.

Thus:—The plaintiff declared, "that the ſhip "*ſprung a leak and ſunk* in the river, whereby the goods "inſured were ſpoiled:"—The evidence was, that ſome of the goods were ſpoiled, and ſome ſaved; and the queſtion was, whether the plaintiff might give in evidence the expence of *ſalvage*, that not being particularly laid in the declaration as a breach of the policy.—Lord *Hardwicke*, C. J. ſaid;—"I think it may be given in evidence; for the inſurance is againſt all accidents. The accident laid in the declaration is, that the ſhip ſunk in the river; it goes on and ſays, that, by reaſon thereof, the goods were ſpoiled, which is the only ſpecial damage laid: Yet it is but the common caſe of a declara-

Carey v. *King*, Ca. Temp. *Hard.* 304.

tion that lays ſpecial damage, when the plaintiff may give evidence of any damage that is within the cauſe of action as laid; and though it was objected that ſuch a breach of the policy ſhould be laid, as that the inſurer may have notice to defend it; it is ſo in this caſe, for they have laid the accident, which is ſufficient."

Only debt or covenant will lie on the policies of the two inſurance companies.

The two inſurance companies being corporations can do no act but by deed under their common ſeals. Their policies of inſurance, therefore, being under ſeal, no action of *aſſumpſit* will lie upon them, but only debt or covenant.

The 6 *G.* I. c. 18. preſcribes a form of declaring in debt.

By the ſtat. 6 *G.* I. c. 18. § 4., each of theſe companies is directed to provide ſuch a ſtock of ready money as ſhall be ſufficient to anſwer all juſt demands upon their policies for any loſſes that may happen, and to pay the ſame from time to time, according to the tenor of their policies: 'And in caſe of refuſal, the inſured may 'bring his action of *debt*, or *on the caſe* (*a*), bill, ſuit, or 'information for the money demanded, againſt the cor-'poration refuſing to pay as aforeſaid, in any of his Ma-'jeſty's courts of record at *Weſtminſter*.—And in ſuch 'action the plaintiff may declare, "*That the ſame cor-*"*poration is indebted to him in the money ſo demanded, and*"*have not paid the ſame according to this act*;" and 'thereupon the plaintiff or plaintiffs ſhall recover againſt 'the ſame corporation double damages beſides full coſts 'of ſuit.

This laſt clauſe abſurdly ſubjected theſe companies to double damages, beſides coſts, in actions which they could not prevent or avoid, for want of a proviſion in the act to oblige the inſured to make diſcovery of his loſs before action brought. This being found to encourage ſuits for the ſake of double damages was ſoon repealed by

(*a*) This act muſt have been drawn by ſome perſon very little ſkilled in legal forms. An action *on the caſe* is here given on their policies *under ſeal*; and this is followed by a form of declaring in *debt*.

a clauſe

a clauſe in a ſubſequent ſtatute. Theſe corporations are now, therefore, only liable to pay their loſſes in the ſame manner as private underwriters (*a*).

If the venue in the declaration be laid in a wrong county, the court, upon motion, will change it to the county where the policy was made (*b*), unleſs it be by *deed*; in which caſe the court will not change the venue, without ſome ſpecial ground being laid to induce them to depart from the general rule (*c*).

The venue may be changed if wrong laid, unleſs it be by deed.

If the inſured ſeek only to recover back his premium, the proper form of action is *indebitatus aſſumpſit*, for money had and received by the defendant to the uſe of the plaintiff.

The premium may be recovered back in an action for money had and received.

Sect. 3.

Of the Plea, and bringing Money into Court.

THE moſt uſual plea to an action on a policy of inſurance is the general iſſue, *non aſſumpſit*; which not only puts in iſſue every fact alledged in the declaration, but alſo enables the defendant to give in evidence any matter that goes to diſaffirm the contract, or to diſcharge the plaintiff's demand under it (*d*).—If, therefore, the defendant would diſpute the legality or the validity of the policy; if he would deny the intereſt of the inſured, and ſhew the policy to have been a wagering one; if he would prove that the inſured has been guilty of miſrepreſentation, concealment, or any other fraud; that the ſhip was not ſea-worthy; that the voyage inſured was not the voyage intended; that the ſhip ſailed

In what caſes the general iſſue is the proper plea.

(*a*) Vid. ſtat. 8 G. I, ch. 30, § 25.—(*b*) And. 66, 2 Str. 1180, Say. Rep. 7, 2 T. R. 275.—(*c*) 1 T. R. 781.—(*d*) *Doug.* 106, 7. Vid. *Bul.* N. P. 152.

on a different voyage from that deſcribed in the policy; that there had been a deviation; that no loſs, or at leaſt not to the amount claimed by the plaintiff, had happened,—the general iſſue is the proper plea (*a*).

Under the general iſſue, the defendant may ſhew non-performance of a warranty.

Though the compliance with every warranty expreſſed in the policy, or implied in the contract, is an affirmative which it is incumbent on the plaintiff to prove; yet, in anſwer to the general evidence by which ſuch compliance is often proved, the defendant may, under the general iſſue, prove a non-compliance: As, that the ſhip did not ſail with convoy; that ſhe never obtained ſailing inſtructions, or had unneceſſarily quitted the convoy; that ſhe was enemy's property, though warranted neutral; that ſhe had forfeited her neutrality, &c.

Or that the inſurance was double.

So the defendant may ſhew that it was a double inſurance, and that the plaintiff had already recovered to the amount of his intereſt againſt the underwriters in

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(*a*) In the caſe of *Goram* v. *Sweeting*, (2 *Saund.* 205), the defendant, to a declaration for a total loſs by the perils of the ſea, pleaded that the ſhip arrived ſafe; "*abſque hoc*, that "the ſhip, her tackle, apparel, and furniture, were ſunk in the "ſea and loſt."—Upon demurrer to this plea, it was objected that the traverſe being in the conjunctive, if iſſue had been taken on it, and ſo much as an anchor or cable had been ſaved, the defendant would have been entitled to a verdict, though every thing elſe had been loſt.—The court gave judgment for the plaintiff.—*Saunders*, who was counſel for the defendant, and probably drew the plea, concludes his report in much diſpleaſure at the judgment of the court, who, he ſays, *decided without much conſideration, or well underſtanding the caſe*. The plea was one of thoſe artful expedients to gain an unfair advantage, in which the bar, in *Saunders*'s time, was very fertile. Special pleas in aſſumpſit are now quite exploded. The plea of *non aſſumpſit*, which puts in iſſue every material allegation in the declaration, and under which the defendant may prove whatever ſhews that, *ex æquo et bono*, the plaintiff has no right to recover, is now the only plea ever pleaded in actions on policies of inſurance, which are meant to be tried upon the merits only.

another

another policy, to whom the defendant has made contribution (*a*).

By ſtat. 19 *G.* II. c. 37. the inſured muſt diſcloſe how much he has inſured in the whole.

To enable the defendant to diſcover whether there be a double inſurance in any caſe, he may, under the ſtat. 19 *G.* II, c. 37, § 6, call upon the plaintiff to declare in writing, within 15 days, what ſums he has inſured in the whole, and how much he has borrowed on bottomry or reſpondentia, for the voyage in queſtion or any part of it (*b*).—It is a little ſingular, however, that this act provides no means of compelling the plaintiff to deliver this declaration, nor any puniſhment for delivering a falſe one. The court would, probably, after the expiration of the 15 days, ſtay the proceedings till a ſatisfactory declaration were delivered. An action would, perhaps, lie at the ſuit of the inſurer againſt the inſured, either for refuſing to make ſuch declaration, or for delivering a falſe one (*c*).

When the defendant may plead a tender.

Where the queſtion between the parties is, not whether the underwriters be liable to pay any thing to the inſured, but only *how much* they ſhall pay, it will be adviſable for them to *tender*, before any action brought, the ſum which, under all the circumſtances, they conceive to be fully ſufficient to ſatisfy every fair claim of the inſured. When ſuch tender has been made and rejected, it may be pleaded, with non-aſſumpſit as to the reſidue of the plaintiff's demand.—The plaintiff, by his replication, may either deny the tender; or confeſs it, and join iſſue on the plea of *non aſſumpſit* as to the reſidue, and upon that iſſue proceed to trial for further damages.—

When he ſhall bring money into court.

When the underwriter, in ſuch caſe, has omitted to make a tender before proceſs has been ſued out againſt him, he ſhould *bring the money into court* (*d*).—Before the ſtat. 19 *G.* II., c. 37., it would ſeem that this was not permitted in actions on policies of inſurance; and yet, in *aſſumpſit*, and covenant for the payment of money, and in debt alſo, even where the plaintiff might have recovered leſs than the ſum de-

(*a*) Vid. ſup. ch. 4, § 4.—(*b*) Vid. ſup. 121.—(*c*) Vid. 2 Inſt. 74, 104. F. N. B. 161.—(*d*) Vid. ſup. ch. 16, § 1.

manded, this practice had been allowed long before (*a*). But now the above act (§ 7.) provides, 'that in debt, 'covenant, or any other action on any policy of insu-'rance, the defendant may bring into court any sum or 'sums of money; and if the plaintiff shall refuse to ac-'cept the same, with costs to be taxed, in full discharge 'of such action; and shall afterwards proceed to trial, 'and the jury shall not assess damages exceeding the mo-'ney brought into court; the plaintiff shall pay the de-'fendant in such action, the costs to be taxed.'

Whether alien enemy ought to be pleaded or given in evidence under the general issue.

It has been already shewn that no action can be maintained on any policy of insurance on the property of an *alien enemy*, either at his own suit, or on his behalf (*b*). If, therefore, an action on a policy be meant to be defended on that ground, it may be specially pleaded in bar, being matter of law which does not go to the git of the action, but only to the *discharge* of it (*c*).—From the report of the judgment, delivered by Lord *Kenyon* in the case of *Brandon* v. *Nesbitt*, it would seem that, in his lordship's opinion, this is merely a temporary disability, which only lasts to the end of the war. This is unquestionably true, when the insurance has been effected before the commencement of the war; because the contract would then be clearly legal, and the remedy only suspended. But whether this would be the case, if the contract were made during the war, is not quite so clear (*d*).

The two insurance companies may, *to debt*, plead *nil debet*, and to covenant, *non infregit conventionem*; and the jury may give the whole, or such part of the sum insured as, the plaintiff is entitled to recover.

As to the two insurance companies, though the clause of the stat. 6 *G.* I. c. 13. § 4. which gave double damages against them, was repealed by the stat. 8 *G.* I. c. 30. § 25.; yet the form of the policy remained, and it was still necessary to sue them either in debt or covenant; from whence this inconvenience arose, that

(*a*) 5 Mod. 212, 1 *Vent.* 356, 2 *Salk.* 596, 7. 1 Lord *Ray.* 255.—(*b*) Vid. sup. ch. 2, § 1.—(*c*) In the case of *Brandon* v. *Nesbitt*, 6 T. R. 23, sup. 36. it was pleaded; but in *Bristow* v. *Towers*, 6 T. R. 35, sup. 37. the defendant pleaded the general issue, and the fact was found by the special verdict.—(*d*) Vid. sup. ch. 2. § 1.

these

theſe companies, when ſued, were obliged to plead ſpecially (*a*); becauſe the general iſſue, *non eſt factum*, only puts in iſſue the exiſtence of the inſtrument upon which the plaintiff declares (*b*). The conſequence muſt have been, that the parties were often entangled in the intricacies of pleading; and even when an iſſue was at length joined, it frequently happened that the whole merits could not come in queſtion, and the jury were obliged to find a verdict for the whole ſum inſured, though in juſtice only a ſmall part of it was due. This drove the defendants to ſeek relief in courts of equity, when the matter in queſtion might as well have been determined at once by the jury, in like manner as in the caſe of private inſurers (*c*).—To remedy this inconvenience, the ſtat. 11 *G.* I. ch. 30. § 43. provides,—'That in all actions of debt 'againſt either of the ſaid corporations, upon any po- 'licies of inſurance under their common ſeal, it ſhall be 'lawful for them to plead generally *that they owed nothing* 'to the plaintiff in ſuch action; and in actions of co- 'venant upon ſuch policies, to plead generally, *that they* '*have not broke the covenants* in ſuch policy contained, or 'any of them. And if iſſue be joined thereupon, it ſhall 'be lawful for the jury, if they ſee cauſe, to find a 'verdict for the plaintiff, and to give ſuch part only of 'the ſum demanded, if in debt, or ſo much damages,

(*a*) If the form of declaring mentioned in the ſtat. 6 *G.* I. c. 18. § 4. (which does not mention or even refer to the policy), had been adopted in actions againſt theſe companies, the inconveniences here enumerated might have been avoided; becauſe, to ſuch a declaration the defendant might have pleaded *nil debet*, and upon that plea the parties might have gone to trial upon the merits, whatever thoſe merits might have been, in like manner as upon the general iſſue in an action of *aſſumpſit* upon a common policy. But, unfortunately, plaintiffs were not *compelled* by the ſtatute to adopt the form of declaration therein given; and they, or at leaſt their attornies, were too much intereſted to purſue a different courſe.—(*b*) 5 Co. 119. —(*c*) Vid. recital to the ſtat. 11 *G.* I. c. 30. § 43.

'if

'if in covenant, as it ſhall appear to them, upon the 'evidence, ſuch plaintiff ought in juſtice to have.'

Sect. 4.

Of the Conſolidation Rule.

The neceſſity of conſolidating actions on policies of inſurance.

We have already ſeen that the underwriters on common policies only bind themſelves *ſeverally*, that is, each for the amount of his own ſubſcription, and not jointly; becauſe it would be impoſſible to find any number of underwriters who would be willing to bind themſelves for each other, as they muſt do if the contract were *joint*; and, indeed, ſince the eſtabliſhment of the inſurance companies, ſuch a policy would be void by the ſtat. 6 G. I. c. 18 (*a*). Hence the inſured, even if he were ſo diſpoſed, cannot bring a joint action againſt all the underwriters on a common policy, but muſt ſeek his remedy by a ſeparate action againſt each. This, though it neceſſarily reſults from the form of the contract, was a ſubject of complaint ſo long ago as the time of Queen *Elizabeth* (*b*); and it cannot be denied that it enabled the inſured, if his demand were diſputed or delayed, to proceed to trial in all the actions, however ſmall his demand might be againſt each underwriter, and thus ſubject each to the entire coſts of an action. They therefore often found it to be the wiſer policy, rather to ſubmit to an unjuſt demand, than ſubject themſelves to ſuch heavy charges. Sometimes, indeed, they ſought relief in courts of equity, which granted injunctions to ſtay the proceedings in all the actions but one, the defendants in the reſt undertaking to pay, according to their ſubſcriptions, if the plaintiff ſhould recover in that one.

This was formerly done by courts of equity.

(*a*) Sup. 41.—(*b*) Vid. the preamble to ſtat. 43 *Eliz.* c. 12, ſup. 24.

This

This being found to be very inconvenient, and little leſs expenſive than the oppreſſive proceeding againſt which the underwriters ſought relief, an attempt was at length made by Mr. Serjeant *Eyres*, in the year 1731, in a caſe where 28 actions had been brought on a policy, to ſtay the proceedings in all but one, the defendants in the reſt entering into a rule of court that thoſe cauſes ſhould abide the event of that one. But the plaintiff refuſing to give up his advantage and conſent to ſuch a rule, the court declared they could do nothing in it (*a*). —It has been ſaid (*b*) that "Mr. Juſtice *Deniſon* intimated, that if the plaintiff perſiſted, againſt his own intereſt, in his right to try all the cauſes, the court had the power of granting imparlances in all but one, till there ſhould be an opportunity of trying that one action; that Lord *Mansfield* then ſtated the great advantage reſulting to each party by conſenting to the application which was made; and added that, if the plaintiff conſented to ſuch a rule, the defendant ſhould undertake not to file any bill in equity for delay, nor to bring any writ of error, and ſhould produce all books and papers that were material to the point in iſſue; and that this rule was afterwards conſented to by the plaintiff."—It is not preciſely ſtated when, or upon what occaſion, this paſſed. From the manner in which it is introduced, it would ſeem as if it had paſſed in the above caſe of —— v. *Glover*. But neither Mr. Juſtice *Deniſon* or Lord *Mansfield* was a judge till many years after that caſe. It is extremely probable that after Lord *Mansfield* came to preſide in the court of King's Bench, he and Mr. Juſtice *Deniſon* did, upon ſome occaſion, expreſs ſentiments ſimilar to thoſe aſcribed to them; becauſe it is well known that Lord *Mansfield*, ſoon after his coming into that court, firſt eſtabliſhed the conſolidation rule, and ſettled the practice upon it in its preſent form. It is ſingular, however, that Sir *James Burrow*, who has

First attempt to do this in a court of law.

(*a*) Vid. —— v. *Glover*, Hil. 5 G. II, 2 *Barnardiſt.* 103.

(*b*) *Park* introd. p. 50.

reported

reported the decisions of the court of King's Bench for many years after Lord *Mansfield* came to preside there, has published no report of the case in which so important an alteration of the practice first took place.

The nature of the rule, and the terms on which it is usually made.

Be this as it may, it is now the constant practice, where a number of actions are brought upon the same policy, to consolidate them by a rule of court, which restrains the plaintiff from proceeding to trial in more than one, and binds the defendants in all the others to abide the event of that one. But this is done upon condition that the defendant shall not file any bill in equity, or bring any writ of error, for delay.

Mutual admissions.

But beside these, the court, upon a proper ground being made by the plaintiff, will impose any other terms upon the defendants, which, under all the circumstances, appear reasonable: As, that they shall produce at the trial, all books, papers, &c. in their custody, material to the point in issue; that the defendant in the action to be tried shall admit his subscription to the policy, the interest of the insured, the loss, or any other fact, upon which the question intended to be tried does not turn, or which is not meant to be seriously disputed. But the court will not impose any terms on the defendant out of the ordinary course, without his consent, which, however, a defendant, who only means to litigate fairly and honourably, will never refuse, when it is only to save the trouble and expence of proving facts which are not disputed. On the other hand, the court, in consideration of these unusual concessions, will impose any reasonable counter-terms on the plaintiff, which the defendant may have to propose.

It is never made a part of the rule that the plaintiff may try the other causes if he please.

It is no part of the consolidation rule that the plaintiff shall be at liberty to try the other causes if he please. Such a liberty would defeat the end proposed by the consolidation rule; and, therefore, if the plaintiff will not consent to the rule without this term, the court will grant imparlances in all the causes but one till he consents (*a*).

(*a*) Per Cur. *Brown* v. *Newnham*, E. 25 G. III. B. R. MS.

Thus

Thus has a practice, which was often attended with ruinous conſequences to the one party or the other, at length, by the wiſdom of the judges, been converted into an effectual means of obtaining ſubſtantial juſtice for both, at a moderate expence, in caſes where the obſtinacy or diſhoneſty of plaintiffs might, before this regulation took place, have rendered that almoſt impoſſible. —On the one hand, the court may ſtay the plaintiff's proceedings for any length of time, if, through perverſeneſs or the cunning of his illiberal adviſers, he refuſe his conſent to conſolidate the actions upon proper terms. If, on the other, the defendants will not accede to ſuch terms, the court, to puniſh them, may permit all the actions to proceed.

Benefits reſulting from this rule.

But though, by the rule, the defendants undertake to be bound by a verdict in the action which is to be tried; yet, this muſt be underſtood to mean ſuch a verdict as ought to ſtand, as a final determination of the cauſe. It is certainly very beneficial to the parties that there ſhould be but one trial for all the underwriters on the policy; but then that trial ſhould be a ſatisfactory one (*a*). And therefore, if the plaintiff obtain a verdict; but the defendant apply for and obtain a new trial, the other defendants ſhall not be obliged to pay their money till the ultimate deciſion of the cauſe in favour of the plaintiff (*b*). And in caſes of inſurance, therefore, the courts ſhould, in general, be leſs ſtrict, and ſometimes grant new trials upon leſs deciſive grounds, than in other caſes.

All the defendants are bound by the verdict in the cauſe tried; but that ought to be a ſatisfactory one.

By the terms of the conſolidation rule, the defendants are bound *generally* not to bring *any writ of error*; the meaning of which is, that, after a fair trial, and ſubſtantial juſtice has been done, no writ of error ſhall be brought, though manifeſt error appear on the face of the record. For even then, the writ of error being againſt the juſtice of the caſe, the court will hold the

If an attorney ſue out a writ of error, though for manifeſt error, this will be a breach of the rule.

(*a*) Per Lord *Mansfield*, 1 *Bl.* 464.—(*b*) R. *Hodgſon* v. *Richardſon*, 3 *Bur.* 1477.

party

party ſtrictly to the terms of the rule by which the plaintiff has been prevented from proceeding in the ordinary courſe of law. If, therefore, under ſuch circumſtances, the defendant's attorney bring a writ of error, the court will grant an attachment againſt him for his contempt in ſuch a breach of the rule (*a*).

Sect. 5.

Of the Trial.

Proof of the plaintiff's caſe.

IF the parties proceed to trial upon the general iſſue, which moſt frequently happens, the plaintiff, as has been already obſerved, muſt, as in all other caſes, begin by proving every material allegation contained in his declaration.—If any of the facts of the caſe, on either ſide, have been agreed to be admitted, theſe admiſſions are reduced into writing and ſigned by the attornies on both ſides, and being read, they ſupply the place of actual proof.

The neceſſity of mutual admiſſions.

In every litigation upon commercial ſubjects, and particularly in matters of inſurance, it is highly proper, nay in ſome caſes abſolutely neceſſary, that the parties ſhould mutually admit every fact that is not meant to be ſeriouſly diſputed, in order that the caſe may be put upon its true merits with as little expence, vexation, or delay as poſſible. Commercial liberality and profeſſional honour both equally require that this ſpecies of candour ſhould be carried as far as the fair and juſt pretenſions of the parties will admit. Nothing can more conduce to the ends of juſtice, nothing can more exalt the national character, or promote the true intereſts of commerce, than ſuch mutual conceſſions.

The rules of evidence are, in general, the ſame in trials upon policies of inſurance as in other caſes. There are only two caſes to be found in our books upon points of evidence which may be thought peculiar to inſurance.

(*a*) R. *Camden* v. *Edie*, 1 *H. Bl.* 21.

The

The firſt is a very ſhort note, in which it is ſaid to have been determined that, in an action on a policy of inſurance, any who have inſured upon the ſame ſhip cannot be witneſſes.—Mr. Juſtice *Buller*, from whoſe book the above note is cited, in delivering his judgment in the following caſe of *Bent* v. *Baker*, ſays, that he took great pains, but without ſucceſs, to get the real ſtatement of that caſe, thinking that it might have been determined on its own particular circumſtances. "However," ſays he, "in conſequence of that determination, judges at *niſi prius* have frequently rejected underwriters as witneſſes. Nor is it extraordinary that at *niſi prius* they ſhould have been guided by the only caſe upon the ſubject, without much examination into the grounds of it."

In general an underwriter cannot be a witneſs in an action on a policy.

Ridout v. *Johnſon*, E. 11 *Ann. Bul.* N. P. 283.

In the other caſe, which was ſolemnly determined upon great conſideration, one *Bowden*, the broker who had effected the policy, was produced as a witneſs on behalf of the defendant. It appeared that *Bowden* had ſubſcribed the ſame policy, immediately after the other underwriters; that an action was then depending againſt him for the ſame loſs; and that he and the other underwriters had filed a bill in equity againſt the inſured for a diſcovery, in order to avoid the policy.—It was objected on the part of the plaintiffs, that he was not a competent witneſs for the defendant. Upon this the defendant produced a releaſe to *Bowden* of all demands for any contribution of coſts both in law and equity, and the coſts of the ſuit in equity were tendered to the plaintiffs, with an undertaking to diſmiſs their bill, which the plaintiffs refuſed.—The witneſs was rejected by Lord *Loughborough*, and this queſtion coming before the court of King's Bench upon a bill of exceptions, it was there determined that, under the circumſtances, *Bowden* was a competent witneſs for the defendant, and that his teſtimony ought to have been received.—Lord *Kenyon* founded his opinion on the ground that the witneſs was not intereſted.—Mr. Juſtice *Aſhurſt* thought that, as he had acted as broker, he could not afterwards, by ſubſcribing the policy, or by any other act of his own, deprive

But if the broker who effects a policy, ſubſcribe it himſelf, after the other underwriters have ſubſcribed it;—he may be a witneſs for the other underwriters, if they releaſe him from all contribution for coſts, though an action be depending againſt him, and he has joined in a bill in equity againſt the inſured, for a diſcovery.

Bent v. *Baker*, 3 T. R. 27.

prive either party of his teſtimony.—Mr. Juſtice *Buller* was of opinion, that if the witneſs was competent to anſwer *any* queſtion, he ought not to have been rejected *generally*; and that, on the principle of neceſſity alone, he ought to have been received; as he might be the only perſon who, from the nature of the thing, could ſpeak to a repreſentation, for inſtance, made by himſelf to the underwriters.

This caſe affords a ſufficient proof, that brokers and others, who act as agents, either for the inſured or the inſurers, ought never to be underwriters (*a*).

The evidence generally adduced on the part of the plaintiff is reducible to the following heads;

1. Proof of the contract;
2. ——— payment of the premium;
3. ——— the intereſt of the inſured;
4. ——— the performance of warranties;
5. ——— the loſs.

1. *Proof of the Contract.*

The policy being proved, is concluſive evidence of the contract; and no parol evidence can be received to vary the terms of it.

The firſt ſtep on the part of the plaintiff is to prove the contract, which is done by producing the policy and proving the defendant's ſubſcription to it. This, if there be no variance, is concluſive evidence of the contract ſtated in the declaration; and no evidence can be received of any parol ſtipulation or agreement to alter, control, or qualify it.

A parol agreement that the riſk was to begin at a place different from that inſerted in the policy, cannot be received in evidence.

Thus, where an inſurance was made "From *Archangel* "to *Leghorn*;" and at a trial at bar, the defendant endeavoured to ſet up a parol agreement, made before the ſubſcription, that the adventure ſhould only begin from the *Downs*:—It was objected, that unleſs ſuch agreement be put in writing, it ſhall be taken that the policy ſpeaks

Kaines v. *Knightly*, *Skin.* 454.

(*a*) Vid. ſup. 209.

the

the minds of the parties; and to ſuffer policies to be defeated by agreements not in writing, would be to leſſen their credit, and render them of no value.—Lord C. J. *Pemberton* ſaid, that policies were ſacred things; and that a merchant ſhould no more be allowed to go from what he had ſubſcribed in them, than he that ſubſcribes a bill of exchange, payable at ſuch a day, ſhall be allowed to ſay that it was agreed to be upon a condition, &c. when the bill may have been negociated: For though neither of them is a ſpecialty, yet they are of great credit, and much for the ſupport, convenience, and advantage of trade.—The jury, however, found contrary to the direction of the court. But this verdict was ſet aſide; and upon another trial at bar, the next term, there was a verdict for the plaintiff, according to the direction of the court.

Witneſſes may be examined, however, to prove an *uſage*, as explanatory of a clauſe in a policy; but their *opinion of its meaning* is not admiſſible evidence (*a*). Queſtions of conſtruction are queſtions of law, which the judges only are competent to determine; and the opinion of no other perſon, whatever may be his ability or experience, can ever be looked upon as of authority in our courts, or received in evidence before a jury.

Witneſſes may prove an *uſage* as explanatory of a clauſe in the policy; but their *opinions* are not admiſſible. How far the uſage of trade to be attended to.

With reſpect to *uſage*, it is a ſort of natural law, formed out of our habits, our intereſts, and the univerſal conſent of mankind. In all maritime affairs, it is regarded as the ſureſt interpreter of the law. There the maxim, *Optima eſt legum interpres conſuetudo*, particularly applies. In queſtions of inſurance, eſtabliſhed uſages muſt in all caſes be adhered to; and in doubtful caſes, they are the ſafeſt guide we can follow. If the uſage of trade in any inſtance be not ſufficiently known or rightly underſtood, it is adviſable to conſult the moſt experienced merchants.—Still, however, the power of uſage is not to deſtroy the law. Uſage is to

How far the *uſage of trade* ought to be regarded.

(*a*) Per Lord *Mansfield*, in *Lyons* v. *Bridge*, *Doug.* 512. Vid. alſo Lord *Mansfield*'s judgment in *Carter* v. *Boehm*, ſup. 347.

be conſulted only where the law is doubtful. Where the law is clear, it muſt prevail. The law is permanent; but uſages ſometimes change, and often diſappear with the circumſtances which gave them birth.

How the procuration ſhall be proved where a policy is ſubſcribed by an agent in the name of his principal.

Policies are often ſubſcribed by an agent in the name of the underwriter, and in ſtrictneſs, the procuration or authority of the agent, thus to ſubſcribe for his principal, ought to be proved. Few defendants, however, would ever think of availing themſelves of the want of ſuch proof in an action which ought never to be tried but upon ſome point fairly diſputable. An inſtance, however, occurs where the attempt was made.

Neale v. *Erving*, Eſp. Rep. 61.

In an action on a policy, the broker was called to prove the ſubſcription. He ſaid that the defendant's name had been ſubſcribed by one *Hutchins*; he did not know by what authority, but that *Hutchins* was in the conſtant habit of ſubſcribing policies in the defendant's name, and had done ſeveral for him and for others to his knowledge.—It was objected that *Hutchins* might have done this by a power of attorney, which might have been limited, or for a particular purpoſe; and therefore ſhould have been ſhewn, that it might appear that *Hutchins* was properly authoriſed.—But Lord *Kenyon* overruled the objection, being of opinion that the acts of *Hutchins* held him out to the world as properly authoriſed; and his having ſubſcribed ſeveral policies in the defendant's name, was ſufficient evidence of that authority to charge the defendant: That if *Hutchins* was only a particular agent for the defendant, it lay on him to ſhew it, not the plaintiff.

2. *Proof of Payment of the Premium.*

Proof of the policy is proof of the payment of the premium.

Every policy contains a clauſe by which the underwriters confeſs themſelves to have been paid by the inſured the conſideration for the inſurance, after the rate of

of ſo much *per cent.*; and the policy being proved, is therefore evidence of the premium's having been paid.

Policies are, in general, effected by the intervention of brokers, between whom and the underwriters open accounts are uſually kept, in which the brokers make themſelves debtors for all premiums, and take credit for all loſſes which they are authoriſed to receive from the underwriters; and theſe accounts are ſettled and adjuſted at ſtated periods. In general, therefore, the underwriter looks to the broker only for his premium. It often, indeed, happens that the underwriter knows not who the inſured is; and as he gives the inſured a receipt for the premium upon the face of the policy, it muſt be ſuppoſed that, having thus diſcharged him, if the premium be left unpaid, he gives credit only to the broker, and from him only can he recover it (*a*).

3. *Proof of the Intereſt of the Inſured.*

How the intereſt ſhall be proved.

The next thing to be proved is the *intereſt* of the inſured (*b*). This may be done by any documents which are evidence of the property which the inſured has in the ſhip or goods inſured, and of the value of that property; ſuch as bills of ſale, bills of lading, invoices, and proof that the goods were on board (*c*), bills of charges of the out-fit, cuſtom-houſe clearances, &c.; and any deficiency in this ſpecies of proof may be ſupplied by parol evidence. So, if the inſured has exerciſed acts of ownerſhip, by directing the loading, &c. of the ſhip, it has been holden that proof of the payment of the people employed, was ſufficient proof of intereſt in the ſhip (*d*).

The rules of evidence in ſuch caſes, where no fraud is ſuſpected, are not very rigidly adhered to:—Therefore

(*a*) Vid. ſup. 203.—(*b*) As to what ſhall amount to an inſurable intereſt, vid. ſup. ch. 4, paſſim.—(*c*) Per Lord *Kenyon*, in *M'Andrew* v. *Bell*, at N. P. *Eſp.* N. P. Rep. 373. ſup. 350.—(*d*) Per Lord *Kenyon*, at N. P. *Amery* v. *Rogers*, *Eſp.* N. P. Rep. 209, ſup. 531.

A bill of parcels with the vendor's receipt for goods bought abroad is ſufficient proof of intereſt.

Ruſſel v. *Bockm*, 2 *Str.* 1127.

where an action was brought upon a policy of inſurance on a cargo of goods purchaſed at *Peterſburgh*; the plaintiff, in order to prove his intereſt, produced a *bill of parcels* from the vendor at *Peterſburgh*, with his receipt to it, and proved his hand-writing. The defendant objected that this was no evidence againſt the underwriters: But Lord C. J. *Lee*, who tried the cauſe, held it to be ſufficient evidence of the plaintiff's intereſt.

Upon a general averment of intereſt the inſured may prove any ſpecies of intereſt that is deemed inſurable, in any *aliquot part* of the thing inſured.

In the ſecond ſection of this chapter (*a*) it has been ſhewn that in the declaration the intereſt may be averred either generally or ſpecially; and that, under a general averment of intereſt, the inſured may prove any ſpecies of intereſt he may have in the ſhip or goods inſured. It is alſo there ſhewn that it is unneceſſary to ſtate the *quantum* of the intereſt in the declaration; for as the plaintiff in aſſumpſit recovers according to the evidence *pro tanto*, he may under a general averment of intereſt in the entire thing inſured, prove an intereſt in any *aliquot part*, and recover damages for the loſs in proportion to ſuch part.

Upon a *valued policy*, it is only neceſſary to prove *ſome* intereſt.

If the policy be an *open* one, the real value of the plaintiff's intereſt muſt be proved: If it be a *valued* one, it has been holden that the inſured needs only to prove *ſome* intereſt, to take the caſe out of the ſtat. 19 G. II. c. 37; becauſe the underwriter, by ſubſcribing the policy, has admitted the value there ſtated; and if more were required, the agreed valuation would ſignify nothing (*b*).

Yet the value in the policy is only *primâ facie* evidence, and may be diſputed.

And yet the value in the policy is only to be taken as *primâ facie* evidence of the amount of the intereſt of the inſured. For though this value is admitted by the inſurer; yet, as he admits it upon the mere repreſentation of the inſured, if he find it to be fallacious, and that the ſpecified value was fictitious, and only a cover for a wager, it cannot be ſuppoſed that he is ſo far concluded by his admiſſion, as not to be at liberty to diſpute the value, and ſhew by evidence, that it was meant as a mere evaſion of the act (*c*).

(*a*) Sup. 589.—(*b*) Per Lord *Mansfield*, in *Lewis* v. *Rucker*, 2 *Bur.* 1171, ſup. 535.—(*c*) Vid. ſup. 199.

In

In an action upon a policy *on goods*, the plaintiff cannot give in evidence a *reſpondentia bond*, as proof of *intereſt* in the goods upon which the money was borrowed, though they were of greater value than the ſum inſured; becauſe bottomry and reſpondentia intereſts are always inſured *as ſuch*, and there is no inſtance of an inſurance on reſpondentia under the denomination of goods (*a*).—Where money has been lent on reſpondentia on *Eaſt India* voyages, the ſtat. 19 *G.* II, c. 37, § 5, conſiders the borrower as having a right to inſure only for the ſurplus value of the goods, above the money borrowed; and the lender as having a right to inſure for the ſum lent. If either were to inſure for more, it would be a *wager* (*b*).

Upon a policy on *goods*, the plaintiff cannot give a reſpondentia bond in evidence in proof of intereſt.

In *Eaſt India* voyages the *lender* on bottomry or reſpondentia can only inſure the ſum lent, and the borrower, the ſurplus value.

But the uſage of a particular trade may ſanction a departure from this rule.—As where the captain of an *Eaſt Indiaman* made an inſurance on "*goods, ſpecie and* "*effects*" on board; he was permitted, in an action on his policy, to give in evidence of his intereſt, money which he had laid out in the courſe of the voyage, and for which he charged reſpondentia intereſt (*c*).

But the uſage of trade may ſanction a departure from this rule.

It would ſeem, however, that, upon a policy on goods generally, the inſured may be permitted to give in evidence of his intereſt, a mortgage or other ſpecial *lien* (*d*).

An intereſt in goods may be proved by a mortgage or other ſpecial *lien*.

In an action upon a policy on bottomry or reſpondentia ſecurities, evidence of the execution of the bottomry or reſpondentia bond, and of the intereſt of the obligor in the ſhip or goods, is ſufficient proof of intereſt in the inſured; and in ſuch caſe, the obligor himſelf is a competent witneſs to prove his own intereſt in the ſhip or goods on which he borrowed the money (*e*).

Evidence of the execution of a bottomry or reſpondentia bond, and of the intereſt of the obligor, is ſufficient proof of intereſt in the obligee; and the obligor himſelf may prove his own intereſt.

(*a*) R. *Glover* v. *Black*, 3 *Bur.* 1394, 1 *Bl.* 399, 405, 422. ſup. 223.—(*b*) Per Lord *Mansfield*, ſ. c. 3 *Bur.* 1400.—(*c*) Vid. *Gregory* v. *Chriſtie*, ſup. 94.—(*d*) Semb. *Glover* v. *Black*, 1 *Bl.* 423. ſup. 225.—(*e*) Vid. 1 *Bl.* 396.

4. *Proof of Compliance with Warranties.*

The truth of affirmative, and the performance of executory, warranties, muſt be ſtrictly and literally proved.

Every material averment in the declaration muſt be proved. One of the moſt material averments is that of the truth of ſuch affirmative warranties, and the performance of ſuch executory ones, as are contained in the policy; ſuch as that the ſhip or goods inſured were neutral property; that the ſhip ſailed within the time limited by the policy; that ſhe departed with convoy; that ſhe was of the force warranted; that ſhe was manned with the ſtipulated complement of men, &c.—This averment of compliance with the expreſs warranties contained in the policy muſt be ſtrictly and literally proved; for theſe warranties, being in nature of conditions precedent, the compliance with them is an eſſential part of the plaintiff's title; and a non-compliance with any warranty contained in the policy, to whatever cauſe this may be imputable, deprives the inſured of all claim to the indemnity meant to be ſecured to him by the contract.

Proof of neutral property.

In the caſe of a warranty that the thing inſured is *neutral property*, it is uſual at the trial to give general evidence of the truth of that warranty; and leave it to the defendant to falſify it, or prove a breach or forfeiture of it. The evidence adduced by the defendant, for this purpoſe, is uſually a ſentence of condemnation as prize by one of the belligerent powers, either on the ground of the thing inſured having originally been enemy's property, or becauſe the ſhip, by ſome miſconduct, had forfeited her neutrality. Copies of the ſentence and of the other proceedings in the court of admiralty, properly authenticated, are always deemed ſufficient evidence of the fact of condemnation, and of the grounds upon which it proceeded (*a*).

(*a*) Vid. ſup. ch. 8, § 4, n. 2, where it has been very fully ſhewn, in what caſes the ſentence of a foreign court of admiralty ſhall have validity in our courts, and be deemed concluſive evidence to falſify this warranty. Conſult alſo the other ſections of the chapter on warranties.

5. *Proof*

5. *Proof of the Loſs.*

The accident or misfortune which was the cauſe of the loſs muſt, as we have already ſeen (*a*), be diſtinctly and explicitly ſet forth in the declaration, in order that the inſurer may have notice of the caſe againſt which he is to prepare his defence.

The true cauſe of the loſs muſt be ſet forth in the declaration.

To charge the inſurer, the loſs muſt appear to have happened during the continuance of the riſk; and caſes have frequently occurred in which this was the principal queſtion. What ſhall be the commencement and duration of the riſk has been already fully treated (*b*); and little need be added here upon this ſubject. Suffice it to ſay, that in the caſe of a *ſhip*, if ſhe be inſured *from* a place, it will be ſufficient to prove that ſhe weighed anchor, or broke ground, in order to ſail on the voyage inſured. If the inſurance be *at and from* a place, the riſk commences from the time of ſubſcribing the policy, if the ſhip be at home; or from the firſt moment of her arrival at the place ſpecified, if that be in a diſtant part of the world.—If the riſk on the ſhip be from the loading the goods on board, then proof that any part of the cargo has been ſhipped, will be evidence of the commencement of the riſk.

The loſs muſt be proved to have happened during the continuance of the riſk.

In the caſe of a *ſhip*.

If the inſurance be on goods, the underwriter may, if he think proper, call on the inſured to prove that they were put in riſk. This may be done by the teſtimony either of the perſons who ſhipped them, or of thoſe who received them on board the ſhip mentioned in the policy. But the beſt evidence of this is the bill of lading, which, if *bonâ fide* made, is in all countries conſidered as an authentic document, and concluſive evidence of the quantity and ſpecies of goods laden on board; becauſe the captain, who muſt exhibit it on his arrival at the port of deſtination, is intereſted that it ſhall not include more in it than he has on board to deliver.—It is, as *Valin* juſtly obſerves, the true and ſpecific proof of the loading, and

In the caſe of *goods*.

(*a*) Sup. 591.—(*b*) Sup. 161.

not only evidence, as between the captain and the merchant, but alſo againſt inſurers and all others (*a*).—The underwriter may, however, impeach the bill of lading on the ground of fraud or colluſion. But the inſured cannot alledge any thing in contradiction to it.

The loſs may be proved by the parol teſtimony of the maſter, officers, and crew of the ſhip, or by any other legal evidence that can be adduced for that purpoſe.

A proteſt is not evidence, while the perſon who made it is living.

But the following caſe will ſhew that the proteſt of the captain, ſo long as he is living, is in no caſe evidence on the one ſide or the other; the only uſe that can be made of it is to contradict his teſtimony, if he varies from it.

The broker's ſhewing it to an underwriter, with other papers relating to the loſs, on demanding payment, will not make it evidence againſt the inſured.

Senat v. *Porter*, 7 T. R. 158.

An inſurance broker applied to an underwriter for payment of a loſs, producing the different papers relating to the ſubject, and, among the reſt, the proteſt ſigned by the captain. The underwriter told him he had looked into the papers, and as there was a point in the caſe, he would not pay the loſs.—In an action on the policy, it was contended on the part of the defendant, that the proteſt was made evidence by the plaintiff, as a paper delivered by his agent to the defendant, containing an account of the loſs on which he reſted his claim; and therefore, that it amounted to a declaration made by the plaintiff to the defendant of the facts on which he required payment.—Lord *Kenyon*, who tried the cauſe, being clearly of opinion that the proteſt was not admiſſible evidence, the plaintiff obtained a verdict.—On a motion for a new trial, the court were clearly of opinion that the proteſt, of itſelf, could not be evidence; and its having been in the broker's hands, and ſhewn by him to the defendant, on an application for payment, would no more render it evidence, than a bill in equity could be made evidence againſt the plaintiff, becauſe its contents muſt have been ſhewn to the defendant.

If a loſs by capture be alledged, the plaintiff cannot prove a loſs by perils of the ſea.

The loſs muſt appear to have ariſen from the very cauſe alledged in the declaration, and no other. If, therefore, a

(*a*) *Valin*, t. 1, p. 604. Vid. *Pothier*, h. t. n. 144. *Emerig.* t. 1, p. 314.

loſs

loſs be alledged in the declaration to have been occaſioned by *capture*, the plaintiff cannot, under ſuch an averment, prove a loſs by *perils of the ſea*, or by any other cauſe than capture (*a*).

So, if there be two counts in the declaration, one for a loſs by *detention of people*, the other for a loſs by *pirates*; the plaintiff cannot, on either of theſe counts, give in evidence that a mob of rioters had boarded the ſhip, in order to compel the captain to ſell a cargo of corn at an inferior price; and that in conſequence of this boarding, the ſhip was ſtranded and a quantity of corn loſt. This could only be given in evidence upon a loſs by *ſtranding* (*b*).

If a mob board a ſhip and run her on ſhore, whereby goods are loſt; this is a loſs by ſtranding, and not by *detention of people*, or by *pirates*.

Though it is a maxim in law that fraud ſhall never be preſumed, but muſt be ſtrictly proved; and it is a rule, founded on that maxim, that in queſtions of inſurance, he who charges barratry, muſt ſubſtantiate it by concluſive evidence (*c*); yet it has been determined that proof of the captain's having carried the ſhip out of the regular courſe of the voyage, for fraudulent purpoſes of his own, is, *primâ facie*, ſufficient to entitle the plaintiff to recover as for a loſs by barratry; without ſhewing negatively, that he was not the owner, or that this was not done with the owner's conſent (*d*).

Proof that the captain was guilty of barratry, is ſufficient; without ſhewing, negatively, that he was not owner, &c.

No evidence can be given of any loſs unleſs it be the immediate conſequence of ſome peril inſured againſt. That which is only a remote conſequence of ſuch peril is not within the policy. If this rule were not adhered to, it would be impoſſible to draw the line, and the inquiry into the remote conſequences of an accident or misfortune would be infinite.

No loſs is within the policy, which is not an immediate conſequence of ſome of the perils inſured againſt.

Thus, where an inſurance was made on a ſhip in the ſlave trade, "At and from *Briſtol* to the coaſt of *Africa*, "during her ſtay and trade there, and from thence to her "port or ports of diſcharge in the *Weſt Indies*." There

In a policy on ſlaves, there is an inſurance againſt mortality by *mutiny*, and in a mutiny ſome are killed, others die of their wounds received in the mutiny, others of chagrin, others by ſwallowing ſalt-water, others jump overboard:

(*a*) Vid. *Kulen Kemp* v. *Vigne*, 1 T. R. 304, ſup. 106.—(*b*) R. *Neſbit* v. *Luſhington*, 1 T. R. 783, ſup. 436.—(*c*) Baratariæ crimen numquam eſt præſumendum, ſed concludentiſſimè probandum. *Caſaregis*, diſc. 1, n. 60; diſc. 225, n. 99. Vid. *Emerig.* tom. 1, p. 372.—(*d*) R. *Roſs* v. *Hunter*, 4 T. R. 33, ſup. 457.

was

The insurer is liable for those who were killed or mortally wounded, in the mutiny; but not for those who died from other causes, though the *remote* consequences of the mutiny. Neither is he answerable for the diminution in value occasioned by the disposition manifested by the mutiny.

Jones v. *Schmoll*, at N. P. Trin. Vac. 1785, 1 T. R. 130, n.

was a memorandum on the policy, in these words;—"The insurers are not to pay any loss that may happen "in boats during the voyage, (mortality of negroes by "natural death excepted), and not to pay for mortality "by *mutiny*, unless the same amount to 10*l. per cent.* to "be computed upon the first cost of the ship, outfit, and "cargo, valuing negroes so lost at 25*l. per* head."—In an action upon this policy, the demand was for the value of a number of slaves *lost by mutiny*.—The evidence of the captain was that he had shipped 225 prime slaves on board: That on the 23d of *May*, before he sailed from the coast of *Africa*, an insurrection was attempted: That the women seized him on the quarter-deck, and attempted to throw him overboard; but he was rescued by the crew: That the women, and some men, threw themselves down the hatchway, and were much bruised; and 12 men and a woman died of their bruises, and from abstinence: That on the 23d of *May*, there was a general insurrection, and the crew were from imminent necessity, obliged to fire upon the slaves, and attack them with weapons: That several slaves took to the ship's sides, and hung down in the water, by the chains and ropes; some for about a quarter of an hour: That several were killed by firing, several wounded, several died from swallowing salt water, or of their wounds, or from bruises; some from chagrin at their disappointment; some from abstinence; some from fluxes and fevers; in all to the amount of 55, who died during the voyage.—The underwriters had paid for 19, who were either killed during the mutiny, or died of their wounds which amounted to 15 *per cent.* For the plaintiff it was contended that, though the rest did not actually die in the mutiny, or of any wounds received at that time; yet, as they had all died *in consequence* of the mutiny, the underwriters were liable. Another consequential loss was, that the circumstance of the mutiny had so lessened the value of the slaves, in the estimation of the planters, that they were sold for 17*l.* a head less than they would otherwise have fetched.—Lord *Mansfield*, who tried the cause, said,—"I think the underwriters not answerable for the loss of the market, or the

rice of it: That is a *remote* conſequence, and not within ny peril inſured againſt by the policy. The queſtion for he jury will be, whether any of thoſe, who died by any ther means, except the being fired upon, or in conſequence of the wounds and bruiſes which they received luring the ſtruggle, are within the meaning of the policy, which inſures againſt damage by mutiny. It is very clear that thoſe who were killed by the firing, or died in conſequence of their bruiſes during the mutiny, are within the policy; the other complicated caſe muſt be left to the jury. I think, clearly, thoſe *not* within the policy, who, being baffled in their attempts, in deſpair, choſe a mode of death, by faſting, or died through deſpondency. That is not a mortality by mutiny, but the reverſe; for it is by the failure of a mutiny.—The great claſs are ſuch as received ſome hurt by the mutiny, but not mortal, and died afterwards from other cauſes; as thoſe who ſwallowed ſalt-water, jumped over-board, &c.—This is the great point."—The jury found,—that all who were killed, or died of their wounds or bruiſes, which they received in the mutiny, though accompanied with other cauſes, were to be paid for: But, that all who had died by ſwallowing ſalt water, or leaping into the ſea, or hanging upon the ſides of the ſhip, without being otherwiſe bruiſed, or died of chagrin, were not to be paid for.

A ſhip is driven by *ſtreſs of weather* on an enemy's coaſt, and there captured. This is a loſs by *capture*, not by the perils of the ſea.

So, where the ſhip *Fly* was inſured from *Exeter* to *London*, againſt *capture* only; and the ſhip on her voyage was driven by a gale of wind on the coaſt of *France*, and there captured by the enemy.—In an action on the policy it was contended on the part of the defendant, that this was a loſs by the perils of the ſea, and not by capture. But Lord *Kenyon*, who tried the cauſe, held that this was clearly a loſs by capture; for had the ſhip been driven on any other coaſt than that of an enemy, ſhe would have been in perfect ſafety. The jury, under this direction, found a verdict for the plaintiff.

Green v. *Elmſlie*, at N. P. *Peake*, 212.

But the plaintiff may give in evidence any loſs immediately proceeding from the cauſe al-

But the plaintiff may give in evidence any loſs or damage which is an immediate conſequence of the accident or injury alledged in the declaration.—As where it was averred in the declaration, that the ſhip ſprung a leak and ſunk in the river, whereby the goods were ſpoiled;

ledged in the declaration; as payment of salvage when the loss is averred to have happened by the sinking of the ship.

Carey v. *King*, Ca. temp. *Hard.* 304.

spoiled: And the evidence was, that many of the goods were spoiled, but some were saved. The question was, whether the plaintiff might give in evidence the *expence of salvage*, though not particularly stated in the declaration, as a breach of the policy.—Lord *Hardwicke* said,—"I think they may give it in evidence; for the insurance is against all accidents. The accident laid in the declaration is, that the ship sunk in the river: It goes on and says, that by reason thereof the goods were spoiled. This is the only special damage laid: Yet it is but the common case in a declaration that lays special damage, where the plaintiff may give in evidence any damage that is within his cause of action as laid. It was objected that such a breach of the policy should be laid that the insurer may have notice to defend it. Now it is so in this case, for they have laid the accident, which is sufficient notice, because some damage must have happened."

The loss must be a direct and immediate consequence of the cause alledged.

The loss must appear not only to have proceeded from the very cause alledged in the declaration, but also to be a direct and immediate consequence of the accident or misfortune which has happened to *the very thing insured*. Therefore an expence which is incurred in consequence of the accident or misfortune stated in the declaration, but which is not incurred in repairing the damage occasioned by it, cannot be given in evidence as part of the loss within the meaning of the policy.

Wages and provisions expended during a repair of sea-damage, is not a loss within a policy on the *ship*.

Fletcher v. *Poole*, at N. P. after East. 1769, *Park* 52.

Thus, where a ship was insured, "At and from *London* to *Newcastle* and *Marseilles*, and from thence to "the *West-Indies*."—The ship, in distress, bore away for *Minorca*, where it being found necessary to repair her, she was unavoidably detained there a considerable time.—The insured brought an action on the policy, to recover the extraordinary *wages and provisions* expended during this detention.—But Lord *Mansfield*, who tried the cause, was of opinion that such a demand could never be allowed as a charge against the insurer *on the ship*; and a verdict was accordingly given for the defendant.

Upon a policy on *ship and goods*, the insured can-

So where an insurance was made "on *ship and goods*, from *Ostend* to *Dominique*."—The ship in her voyage having

having met with bad weather, and being in great diſtreſs, the crew threatened to take the command from the maſter, unleſs he would make for the firſt port. The maſter bore away for *Ferol* to repair the ſhip; but by the time the repairs were finiſhed, the crew deſerted her. He then got another crew, and at the moment he was going to ſail, the *Spaniſh* governor ſtopped him, and after detaining him 37 days, diſcharged him, and he proceeded on his voyage, and at length arrived at *Dominique*.—An action was brought on the policy to recover the loſs incurred by *wages*, *proviſions*, and *demurrage*, during the ſhip's detention at *Ferol*.—On the part of the underwriters it was contended that the freight, and not the ſhip, is liable for this loſs, and that the charge of demurrage could not be allowed upon this policy.—Mr. Juſtice *Buller*, who tried the cauſe, was of this opinion, and nonſuited the plaintiff.

not recover for wages, proviſions or demurrage, during a ſhip's ſtay to repair, and detention by a foreign power.

Eden v. *Poole*, at N. P. after Hil. 1785, *Park* 54.

So, where a *ſhip* was inſured, "At and from *London* "to *Africa*, during her ſtay and trade there, and to her "port of diſcharge in the *Weſt Indies*."—The ſhip on her voyage from *Africa* with a cargo of ſlaves to her port of diſcharge in the *Weſt Indies*, touched at *Barbadoes* for the purpoſe of watering, where ſhe was detained a conſiderable time by an embargo, which had been before laid by the commander in chief on all ſhips at that iſland. The captain applied for leave to depart, and being refuſed, he ſailed without leave, but was purſued by a ſloop of war, and after a ſlight engagement, brought back, and the crew diſtributed among the men of war. The embargo continued from the 18th of *December*, till the 27th of *January*. The ſmall pox broke out among the ſlaves on the 22d of *January*. In conſequence of all this, and for want of mariners to navigate the ſhip, ſhe was detained at *Barbadoes* above two months after the embargo was taken off. She then ſailed to *Jamaica*, her place of diſcharge.—An action was brought on the policy to recover the amount of the additional *wages and proviſions* occaſioned by the ſhip's detention under the embargo. Mr. Juſtice *Buller*, who tried the cauſe, was of opinion that this policy, being upon the body of the ſhip, and the average loſs thereon, excluſive of the charge for wages and

The inſured upon a policy *on the ſhip*, cannot recover the expence of wages or proviſions occaſioned by a detention under an *embargo*.

Robertſon v. *Ewer*, 1 T. R. 127.

and provisions, being less than 3 *per cent.*, the plaintiff was nonsuited.—Upon a motion to set aside this nonsuit, it was contended on the part of the plaintiff, *first*, that this loss, being occasioned by the embargo for which the insured might have abandoned, and recovered as for a total loss, he might recover a partial loss to the amount of the damage actually sustained (*a*); and *secondly*, that this was a loss occasioned by the barratry of the master, by his resistance to lawful authority.—But the court determined that the plaintiff had no right to recover on either ground.—Lord *Mansfield* said,—"There is no authority to shew that, on this policy, the insured can recover for such a loss; but it is contrary to the constant practice. On a policy on a *ship*, sailor's wages, or provisions, are never allowed in settling the damage. The insurance is on the body of the ship, tackle, and furniture; not on the voyage or crew. Here it is admitted that no damage was done to the ship, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover."—Mr. Justice *Buller* said;—"If the ship had been detained in consequence of an injury which she had received in a storm, though the underwriters must have made good the damage; yet the insured could not have claimed the amount of wages or provisions, during the time spent in repairing. The court only look to the *subject matter of the insurance*. Here the ship was safe; and the wages and provisions are no part of the thing insured."

Yet a ship's provisions are considered as *part of the ship*, and are protected by the policy.

Yet, in the following case, which is not easily reconcileable with the three foregoing cases, it was the opinion of the court that a ship's provisions are protected by the policy, even when landed on a *Bank-Saul* during a repair; and that they were to be considered as a *part of the ship*.

A ship's provisions, during a repair, are landed on a *Bank-Saul*, and there consumed by fire: The underwriters on the ship

An insurance was made on a *China* ship; and, in the usual words, "On the tackle, ordnance, ammunition, artillery, and *furniture* of the ship."—In an action on this policy, it appeared that while the ship was lying off *Bank-Saul Island*, in the river *Canton*, it became necessary

(*a*) Vid. *Roteh* v. *Edie*, 6 T. R. 425. sup. 439.

to

to refit her, for which purpoſe the ſtores and proviſions were taken out of her, and put into a warehouſe called a *Bank-Saul*, where they were deſtroyed by accidental fire.—At the trial, this accident was conſidered as if it had happened *on board the ſhip* (*a*), and it was admitted that the policy covered all the articles but the *proviſions*, and if they were not protected by the policy, then there would not be a partial loſs of 3 *per cent.*—On the part of the defendant it was contended that the proviſions, which were merely for the ſhip's crew, were not protected by a policy on the *ſhip*. But one of the jury, obſerving that it had been determined in Lord *Mansfield*'s time, that they were included under the word "*furni-*"*ture*," and that the merchants in the city had ever ſince acquieſced in this deciſion, there was a verdict for the plaintiff.—On a motion for a new trial, the above caſe of *Robertſon* v. *Ewer* was relied on as a clear authority, to ſhew that the ſhip's proviſions were not protected by a policy on the ſhip; and that, if proviſions were included in the term "furniture," there could never be a total loſs, after a conſumption of any part of them.—The court, however, were unanimouſly of opinion that the underwriters were liable for the expence of the proviſions which were bought to replace thoſe conſumed by the fire, which was an accident within the words of the policy.—Lord *Kenyon* ſaid;—"When it was ſtated, at the trial, that *proviſions* were included in the word '*furniture*,' I confeſs I was ſomewhat at a loſs to know to what extent the underwriters were liable on words ſo indefinite as theſe which are uſed. If the proviſions be inſured as part of the out-fit of the ſhip, and they were deſtroyed by one of the perils inſured againſt, there is an end of the queſtion; a loſs has happened within the meaning of the policy, and conſequently the defendant is liable. But it was ſaid in the argument, that the inſtant any of the proviſions were conſumed on board, there could not be a total loſs: But the anſwer is, that that comes within the *wear and tear of the ſhip*; and it might

and *furniture* are liable.

Brough v. *Whitmore*, 4 T. R. 206.

(*a*) Vid. *Pelley* v. *Roy*, *Ex. Aſſ.* 1 *Bur.* 341., ſup. 181.

as

The diſtinctions made between this caſe and that of *Robertſon* v. *Ewer.*

as well be ſaid, that if a maſt were a little injured, there could not be a total loſs. The caſe of *Robertſon* v. *Ewer* is clearly diſtinguiſhable from the preſent. Here the proviſions were conſumed by an accidental fire on board the ſhip, (for the iſland and the ſhip were, for this purpoſe, the ſame), and within the meaning of the policy; but, in that caſe, they were conſumed *by the negroes*, during the detention of the ſhip *(a)*."—Mr. Juſtice *Buller* ſaid, —"It is perfectly clear that, in every inſtance where loſſes have been ſettled, the proviſions put on board the veſſel, when ſhe ſailed, have been conſidered as *part of the ſhip*. The value of the ſhip alone comprehends the hull, the maſts, the tackle, and the *proviſions*. Then, if the proviſions be included in a policy on the ſhip, and all the proviſions be loſt, the underwriters muſt make good the whole loſs, whether it be a valued or an open policy. But it has been ſaid, that if an accident happen after ſome of the proviſions are conſumed, the underwriters are entitled to a deduction to the amount of ſuch proviſions: I will anſwer this, as the argument applies, firſt, to a valued, and then, to an open policy. As to the firſt; from the nature of the policy, the proviſions are not inſured againſt all events; they are only inſured againſt particular riſks. Again, there is nothing from

(*a*) According to the report of *Robertſon* v. *Ewer*, Lord *Manſfield* laid it down as a general rule, not reſtricted to any particular trade, that on a policy on a *ſhip*, ſailor's wages or *proviſions* are never allowed in ſettling the damages; nor was it ever objected in that caſe, that the proviſions had been conſumed by the ſlaves. Indeed, it is not likely that ſuch an objection could have been made; for it is well known, that the food provided for the ſlaves is part of the cargo, and very different from that which is provided for the ſhip's company; beſides, the ſhip's company muſt have conſumed a part. But, be this as it may, if it be neceſſary, in order to ſupport the caſe of *Robertſon* v. *Ewer*, to ſuppoſe that the proviſions, for which the inſured wanted to charge the underwriters, were *conſumed by the ſlaves*, and not by the crew, then the caſes of *Fletcher* v. *Poole*, and *Eden* v. *Poole*, where no ſuch ground could be alledged, cannot be ſuſtained.

which

which there can be ſalvage: If the body of the ſhip, and every thing on board, be ſunk, or burned, there can be no ſalvage. And, in the caſe of an open policy, the inſured muſt prove, by evidence, what was the value of the whole; and then the ſame reaſons apply as in the caſe of a valued policy. With reſpect to the caſe of *Robertſon* v. *Ewer*, I thought at firſt that it applied ſtrongly to the preſent; and if I ſtill entertained the ſame opinion, I would not, on account of any uſage to the contrary among underwriters, overturn a ſolemn determination of this court: But that caſe, and the two others there mentioned, are clearly diſtinguiſhable from the preſent. In all thoſe caſes the inſured wiſhed to charge the underwriters with the amount of the proviſions conſumed, during the time when the ſhips were detained. Of thoſe, therefore, it is ſufficient to ſay, that an inſurance is on the ſhip *for the voyage*; but during a detention, the ſhip is not proceeding; and therefore the underwriters are not liable *(a)*. This caſe alſo differs from *Robertſon* v. *Ewer* in another circumſtance: There, the proviſions were conſumed by the ſlaves on board, and not by the ſhip's crew, and the ſlaves are conſidered as a part of the cargo. The words of Lord *Mansfield*, in that caſe, muſt be taken with reference to the caſe then before him. He was then ſpeaking of a charge for proviſions and during the detention of the ſhip, and for the maintenance of the ſlaves; and he ſaid;—"There is no authority to ſhew that, on "*this* policy, the inſured can recover for *ſuch a loſs*; but "it is contrary to the conſtant practice." Then he proceeded to ſay that, on a policy on a ſhip, ſailor's wages or proviſions are never allowed in ſettling the damages. Now, even if thoſe latter words be taken in their general ſenſe, and not confined to the caſe immediately before the court, they are accurate; for proviſions *eo nomine*, are not taken into conſideration.—If the captain be obliged,

(*a*) There muſt be ſome miſtake of the reporter in this place. It cannot be ſuppoſed that the learned judge ever meant to ſay, that while a ſhip is detained, ſhe is not under the protection of the policy.

in conſequence of the detention, to purchaſe other ſtores for the remainder of the voyage, the underwriters are not anſwerable for theſe; but only for thoſe which were on board at the time of the inſurance, ſince they only formed a part of the value of the ſhip.—The uſage of merchants, as to the conſtruction of theſe inſtruments, ſtands unimpeached, and therefore it muſt prevail in this caſe."

When the expence of wages and proviſions ſhall be a general, when a particular, average.

By the law of *France (a)*, the expence of wages, and proviſions of the ſeamen during a detention, are reputed a *groſs*, or *general average*, if the ſhip was hired *by the month*; but if hired *for the voyage*, this expence is borne by the ſhip alone, as a ſimple average.—*Pothier (b)* gives the following reaſon for this diſtinction. The wages of the ſailors being included in the freight, when the ſhip is chartered *for the voyage*, the owner, who receives freight for the whole voyage, is bound to ſupply the labour of the ſailors for the whole time of the voyage, of which the time of the detention makes a part.—On the other hand, when the ſhip is chartered *by the month*, the owner, receiving no freight during the detention, owes no ſervice of the ſailors to the affreighter. The affreighter, therefore, ought, in conſideration of the benefit he derives from the labour of the ſailors, to pay for their labour and proviſions during the detention.

But the uſage of trade often determines what ſhall be deemed part of the ſhip.

But the uſage of trade often controls the general conſtruction of the policy; and what ſhall or ſhall not be protected as part of the ſhip and furniture depends, in ſome caſes, on the uſage of a particular trade.

Whether the fiſhing tackle in the *Greenland* whale fiſhery be included in a policy on the ſhip, depends on the uſage of the trade.

As where an inſurance was made, in the uſual form, on a ſhip employed in the *Greenland* fiſhery; and, in an action on the policy, the queſtion was, whether the *fiſhing-tackle* was included in the inſurance on the *ſhip, furniture*, &c.—Lord *Mansfield*, who tried the cauſe, ſaid that there was no doubt but that the boats, and rigging, and ſtores, belonging to the ſhip were included; and as to the fiſhing ſtores, it muſt depend on the *uſage of the*

Hoſkins v. *Pickerſgill*, E. 23 G. III, B. R. MS.

(*a*) Ord. de la mar. tit. *des avaries*, art 7. Vid. *Emerig.* tom. 1, p. 539.—(*b*) Tit. *des chartes parties*, n. 85.

trade.

trade. On this, there was contradictory evidence. The plaintiff, however, obtained a verdict, which the court afterwards ſet aſide, and granted a new trial, upon the ground that the evidence of the uſage was principally in favour of the defendant.

The *captain's clothes, the ſhip's proviſions, and goods laſhed to the deck*, are not within a policy on *goods*.

In a former chapter we had occaſion to obſerve that the *captain's clothes*, the *ſhip's proviſions*, and *goods laſhed to the deck*, are not comprehended under the general denomination of "*goods, wares, and merchandizes,*" in the policy; and that the inſurer is not, therefore, liable for any loſs on theſe articles unleſs they be ſpecifically named (*a*).

Roſs v. *Hunter*, at N. P. after Hil. 16 *G.* III. *Park* 20.

Therefore, where an action was brought on a policy on *goods*, the property of the captain, for ſix months, the loſs proved was chiefly for *goods laſhed to the deck*, the captain's *clothes*, and the *ſhip's proviſions*.—On the part of the defendant it was proved by an underwriter and a broker, that none of theſe things are within a general policy on *goods*; becauſe the riſk is greater, as to goods laſhed on deck, than on other goods; and that a policy on goods generally, means only ſuch goods as are merchantable, and a part of the cargo. They alſo ſwore that when goods like the preſent are meant to be inſured, they are always inſured by name, and the premium is greater.—Lord *Mansfield* ſaid he thought it conſiſtent with reaſon, and underſtood the uſage to be ſo; and therefore the plaintiff withdrew a juror, the premium having been paid into court.

The inſured on *goods*, is not entitled to freight paid *pro rata itineris*, during capture.

In an action on a policy on *goods*, the inſured cannot recover for freight *pro rata itineris* paid by the owner of the goods to the owner of the ſhip; where the ſhip is captured and detained by a foreign power, and afterwards reſtored.

Goods are inſured, the ſhip and goods are captured and ſold, but the ſentence reverſed, and the proceeds ordered to be paid to the owners: The

Thus; in an action on a policy of inſurance on goods, "At and from *Nevis* to *Briſtol*," it appeared on the trial that the ſhip on her voyage was captured by the *French*, carried into *Morlaix*, and there condemned. Upon an appeal to the parliament of *Paris*, this ſentence was reverſed, and the ſhip and cargo were decreed to be re-

(*a*) Vid. ſup. 225.

freight *pro rata itineris*, paid by the owner of the goods, is not a charge for which the insurers on the goods are liable.

Bailie v. *Modigliani*, Hil. 25 G. III. B. R. MS.

stored; or the net proceeds thereof, if sold, to be paid to the claimants. The ship and cargo having been sold before this sentence was obtained, the money, after deducting all charges, was remitted to the plaintiff, who was agent for the owners of the ship, the owners of the goods, and the underwriters. The underwriters paid the charges of the suit, and all other expences. The plaintiff (the common agent) paid to the owners of the ship, freight *pro rata itineris*; and the question was, whether he was to be reimbursed by the owners of the goods, or whether this was a loss within the policy, for which the underwriters were liable.—The court, after time taken to deliberate, were unanimously of opinion, that the underwriters were not liable to this charge.—Lord *Mansfield* said;—"The question is, whether the owner of the goods can charge the underwriters with this *item*, which was paid for freight *pro rata itineris*, by the owners of the goods to the owners of the ship. As between the owners of the ship, and the owners of the cargo, in case of a total loss, no freight is due; But as between *them*, no loss is total, where part of the property is saved, and the owner takes it to his own use. Here the value of the goods was restored in money, which is the same as the goods; and therefore freight was certainly due *pro rata itineris*. But, as between the insured and the underwriters *upon the cargo*, it is a contract of indemnity, and the latter have nothing to do with the *freight*. The owner of the ship has a lien for his freight; but, in the case of a loss, really total, no freight is due. In the case of a loss, total as between the insurer and insured, with salvage, the owner may either take the part saved or abandon it; but in neither case can he throw the freight upon the underwriters; because they have not engaged to indemnify him against it, and have nothing to do with it."

The underwriters on *goods* are in no case liable for *freight*.

In assumpsit the plaintiff recovers damages according to the evidence *pro tanto*, and therefore he is not obliged to prove all the damage alledged in his declaration. Hence, though the plaintiff declare as for a *total loss*, he

If the plaintiff declare upon a total loss, he may recover for a partial loss.

he may recover as for a *partial loss*.—So, if he declare as for a total loss of the entire thing insured, when in fact he was only owner of, or interested in a *part* thereof, and the loss be only partial, yet he shall recover his proportion of such partial loss to part.

So if he declare for a loss upon an entire thing, when he is owner of only a part.

Thus.—An insurance was made on *one fourth* of a ship; and the insured declared expressly as for a *total loss* of the ship, but the evidence only proved a partial loss; now was it attempted to prove a total one, the damage being so small that it might have been repaired for 50 l.—It was objected at the trial, on the part of the defendant, that evidence of a *partial loss*, was not sufficient to maintain a declaration for a *total loss*, and it was suggested that the practice was contrary.—A verdict, however, was taken as for a partial loss, subject to the opinion of the court on the above question.—The court were clearly of opinion with the plaintiff.—Lord *Mansfield* said;—"I was satisfied upon principles, provided the practice did not interfere; but, having heard of no determination in support of the practice alledged, the case must stand upon principles; and, upon principles, it is clear that the plaintiff may, upon this declaration, recover as for a partial loss. This is an action of *assumpsit*, which is a liberal action; and the plaintiff may recover *less* than his declaration would support, though not *more*. There are two grounds of the plaintiff's declaration, the policy, and the damage to the ship. Whether this be a total or a partial loss, is a question that goes to the *quantum of damages*, not to the *ground of the action*. The ground of the action is the same, whether the loss be total or partial; both are perils within the policy. As to the defendant's not coming prepared to defend a partial loss; this, indeed, would be an objection, if it were true. But the defendant does, in truth, come prepared to shew, either, that no damage had happened at all; or, at least, that damage had not happened to the extent alledged.—Neither could the defendant have been hurt by a judgment by default; for the plaintiff could not have recovered, upon the writ of enquiry, more

Upon an insurance on *one fourth* of a ship, Plaintiff declares as for a *total loss*; but proves only a *partial loss*, he shall recover such partial loss.

Gardiner v. *Croasdale*, 2 *Bur.* 904, 1 Bl. 598.

damages than he could prove that he had actually suffered. If this objection were to prevail, it would introduce the addition of unneceſſary counts in the declaration. "In an ejectment for more, the plaintiff may recover leſs: It is every day's practice."—Mr. Juſtice *Denison* concurred, and ſaid;—"In an action for damages, the plaintiff is to recover according to his proof, *pro tanto*; but he is not obliged to prove all that he has alledged. If it had been an action of covenant for pulling down a houſe, might not the plaintiff be intitled to damages for pulling down a part of it? This is no variance of the evidence from the declaration. The evidence tends, in a certain degree, to the proof of what is alledged in the declaration. Two counts would have been unneceſſary."

One of ſeveral part owners of a ſhip may inſure the freight generally, without mentioning what ſhare he has in the ſhip; and he may declare generally, and recover according to his intereſt.

Riſley v. *Barrett*, at N. P. C. S. 12 *December* 1778. *MS.*

So, where the plaintiff was one of four part owners of a ſhip, and each inſured the freight without mentioning that it was only a *ſhare of the freight* that he was intereſted in.—The plaintiff, in his declaration, ſtated his intereſt generally, and not as being an *aliquot part* of the ſhip.—It was objected on the part of the defendant, that the plaintiff ſhould have alledged his intereſt according to the truth, and not in that general form. That the regiſter of the ſhip, which was produced, was concluſive evidence as to the perſons who were owners, and of their reſpective ſhares; and the regiſter ſhewed that the plaintiff was only owner of the fourth part.—Mr. Juſtice *Buller*, who tried the cauſe, held, that this being an open policy (*a*), the plaintiff might recover according to his intereſt; and he had a verdict accordingly.

A fortiori if he prove a greater intereſt than he alledged.

So, if the plaintiff prove a greater intereſt than he alledged in his declaration, this ſhall not preclude him from recovering to the extent of the intereſt he has alledged.

Page v. *Rogers*, at N. P. after Hil. 1785, *Park* 402.

Thus, where the declaration ſtated that the plaintiff was poſſeſſed of *one third* of the ſhip inſured; and it was proved that he had purchaſed the *whole* at one period.

(*a*) Had it been a *valued policy*, it would have made no difference in this caſe; for the inſurer may diſpute the amount of the intereſt of the inſured if it be over-valued, as well in an action upon a valued policy, as upon an open one.

There

There being no evidence to ſhew that he had ſince parted with any ſhare of it, it was inſiſted that this was a variance.—But Lord *Mansfield* held that this was ſufficient evidence; for, *omne majus continet in ſe minus*; and overruled the objection.

By the preamble to the ſecond ſection of the ſtat. 19 *G.* II. c. 32, it appears that, before the paſſing of that act, if an obligor in any bottomry or reſpondentia bond, or an inſurer in any policy of inſurance, became bankrupt before a loſs happened, it was made a queſtion whether the inſured in ſuch policy, or the obligee in ſuch bond, could be let in to prove his debt, or to receive any dividend under the commiſſion: But now, by that ſection, it is provided, 'That ſuch obligee or inſured 'ſhall be admitted to claim, and after the loſs or contingency ſhall have happened, to prove, his debt, and 'to receive a dividend of the bankrupt's eſtate, in proportion to the other creditors; and that the bankrupt 'ſhall be diſcharged from the debt owing from him on 'ſuch bond or policy, in like manner as if ſuch loſs or 'contingency had happened, and the money had been 'payable, before the iſſuing of the commiſſion.'

By 19 *G.* II, c. 32., if an underwriter become bankrupt before a loſs happen, the inſured may claim; and after a loſs, prove his debt under the commiſſion, and receive his dividend, as if the loſs had happened before the Bankruptcy.

As the words of the above preamble refer only to bottomry contracts, and inſurances on ſhip and goods on board, it became a doubt whether it extended to *inſurances upon lives*, though the words of the enacting part are general; and it was ſuppoſed that the legiſlature could not have had inſurance upon lives in contemplation, becauſe the riſk in ſuch inſurances may remain unſettled for many years:—But it has been determined that the general words of the enacting part are not reſtrained by the preamble; and that it comprehends *all inſurances*, and conſequently inſurances *upon lives* (*a*).

This ſtatute extends to inſurances upon lives.

(*a*) R. *Cox* v. *Loſtard*, B. R. Hil. 24 *G.* III. *Doug.* 166, n. Vid. *Pattiſon* v. *Banks*, *Cowp.* 540; and *Mace* v. *Cadell*, *Cowp.* 232.

BOOK THE SECOND.

Of Bottomry and Respondentia.

THIS subject may be treated under the following distribution;

1. Of the nature and form of the contract;
2. Of the parties to it;
3. Of the thing hypothecated;
4. Of the principal and marine interest;
5. Of the perils or risks to which the lender is liable;
6. Whether he be liable to *general average*;
7. Whether he be entitled to the *benefit of salvage*.

CHAP. I.

Of the Nature and form of this Contract.

Bottomry defined.

BOTTOMRY is a contract in nature of a mortgage of a ship, on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed; and he pledges the keel or *bottom* of the ship, *pars pro toto*, as a security for the repayment: And it is stipulated that if the ship should be lost, in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship should arrive in safety, then he shall receive back his principal, and also the interest agreed upon, which is generally called the *marine interest*, however this may exceed the legal rate of interest (*a*). Not only the ship

(*a*) Vid. 2 *Bl.* Com. 458.

and

and tackle, if they arrive ſafe, but alſo the perſon of the borrower, is liable for the money lent and the marine intereſt.

Reſpondentia.

When the loan is not on the ſhip, but on goods laden on board, which, from their nature, muſt be ſold or exchanged in the courſe of the voyage, the borrower's perſonal reſponſibility is then the principal ſecurity for the performance of the contract, which is therefore called *reſpondentia* (*a*). In this conſiſts the principal difference between bottomry and reſpondentia. The one is a loan upon the ſhip, the other upon the goods. In the former, the ſhip and tackle, being hypothecated, are liable, as well as the perſon of the borrower; in the latter, the lender has, in general, only the perſonal ſecurity of the borrower. But the perſonal reſponſibility of the borrower is not in all caſes, the only ſecurity of the lender. Where the money is lent for the outward and homeward voyage, the goods of the borrower on board, and the returns for them, whether in money, or in other goods purchaſed abroad with the proceeds of them, are liable to the lender (*b*). The money is to be repaid to the lender, with the marine intereſt, upon the ſafe arrival of the ſhip, in the one caſe, and of the goods, in the other. In all other reſpects, theſe contracts are nearly the ſame, and are governed by the ſame principles.

Difference between them.

Denomination.

The contract of bottomry is called by the *French*, *contrat de prêt à la groſſe avanture*, or *contrat à la groſſe*. In *Le Guidon* (*c*) it is called *bomerie*, and *Molloy* (*d*) ſays that it is derived from *bomerie* or *bodmerie*, a *Flemiſh* word which ſignifies the *keel* or *bottom* of a ſhip.

In uſe among the *Romans*.

Though it is extremely probable, as we have already ſhewn (*e*), that the contract of inſurance was unknown among the ancients, it is certain that the *Romans* were well acquainted with that of bottomry, or rather reſpondentia, which they denominated *nauticum fœnus* or *contractus tra-*

(*a*) 2 *Bl.* Com. 458.—(*b*) *Pothier*, h. t. n. 34. *Emerig.* t. 2, p. 476. 561.—(*c*) Ch. 18.—(*d*) De jur. marit. b. 2, c. 11, § 12.—(*e*) Sup. 5.

jectitia

jectitia pecunia; and it is treated of both in the *Digeſt* and the *Code*, *de nautico fœnore*. They called the ſum lent *pecunia trajectitia*, perhaps becauſe the borrower was uſed to take the money on board with him in ſpecie, in order to employ it in trade in the courſe of the voyage; for ſuch was probably the original deſtination of ſuch loans among the *Romans*, who exported very little from *Rome*, but ſent money from thence to purchaſe the merchandize which the immenſe conſumption of that city demanded. The money thus lent was to be repaid, if the voyage proved fortunate, with a ſtipulated intereſt, which was called *periculi pretium*, ſometimes *uſura maritima*, or *uſura nautica*; but upon this condition, that if the ſhip ſhould be loſt by the perils of the ſea, in the courſe of the voyage propoſed, the lender ſhould loſe both principal and intereſt.

Pecunia trajectitia.

If the money was ſpent on ſhore, it was not *pecunia trajectitia.*

If the money was ſpent in the place where it was lent, it was not *pecunia trajectitia* (*a*). But if it was laid out in the purchaſe of goods, which were embarked at the riſk of the lender, then it retained its quality of *pecunia trajectitia*. So that, with the *Romans*, as with the moderns, it was of the eſſence of this contract that the loan ſhould be expoſed to the perils of the ſea, at the riſk of the lender.

Whether the *Roman nauticum fœnus* be materially different from the modern bottomry.

The author of *Le Guidon* (*b*) ſays that there is but little reſemblance between the contract of bottomry, as it is in uſe in modern *Europe*, and the *nauticum fœnus* of the *Romans*. But upon an attentive compariſon of the one with the other, it will appear that they are ſtill in principle the ſame; and only differ in the forms which modern regulations have given to the contract now in uſe.

How bottomry differs from a ſimple Loan.

Bottomry differs very materially from a ſimple loan. In a loan, the money is at the riſk of the borrower, and muſt be paid at all events. *Incendium ære alieno non liberat debitorem* (*c*). But in bottomry, the money is at

(*a*) Si eodem loci conſumatur, non erit trajectitia, ff. de neut. fœn. 1.—(*b*) Ch. 18, art. 1.—(*c*) Cod. l. 11, ſi cert. pet.

the

the riſk of the lender during the voyage. Upon a loan, only the legal intereſt can be reſerved: But upon bottomry, any intereſt may be legally reſerved which the parties agree upon.

The analogy between this contract and that of inſurance is much ſtronger. In the one the lender, in the other the inſurer, is liable to the perils of the ſea; the one receives the marine intereſt, the other the premium, as the price of the riſk, which varies in each according to the length and danger of the voyage. The lender and the inſurer are, in general, expoſed to the ſame perils, which have the ſame commencement and end. The marine intereſt, like the premium of inſurance, is not due, if no riſk be run, though this be prevented by the voluntary act of the borrower. Analogy between bottomry and inſurance.

But though theſe contracts thus far agree, they differ eſſentially in many reſpects. In bottomry, the lender furniſhes the borrower with the money to purchaſe the goods which are put in riſk; an inſurer, on the contrary, furniſhes nothing of the ſubject matter of the inſurance.—The lender, in taking on himſelf the riſk of the goods, does not contract any obligation to the borrower; a loſs by the perils of the ſea does not make him a debtor to the borrower, but only prevents the borrower from becoming his debtor: Whereas, upon a loſs happening, the inſurer becomes a debtor to the inſured to the amount of ſuch loſs, not exceeding the ſum inſured (*a*).—In caſe of ſhipwreck, the lender, by the general law, has a *lien* on the effects ſaved, to the extent of the ſum lent and the marine intereſt, *to the excluſion of the borrower*; whereas an inſured has an intereſt in the effects ſaved, *in common with the inſurer*, ſo far as he was uninſured.—The lender is not liable for particular average; but the inſurer is liable for this, unleſs he be exempt by expreſs ſtipulation.—By the clauſe, *free of average*, inſurers may be exempted from general average; but, in a caſe where the lender is liable by law to gene- How they differ.

(*a*) *Pothier*, h. t. n. 6.

ral

ral average, such a clause would be illegal and void (*a*). If the voyage be divisible into several distinct risks, the premium of insurance may be apportioned to each, and there may be a return for such as have not been begun; but, in bottomry, if the risk be once commenced, and no loss happen, the marine interest must be paid entire (*b*).

The utility of this contract.

This contract is of great utility in a country where the persons engaged in trade have not a sufficient capital to carry on their foreign commerce, by inducing those unskilled in trade to embark their money in it, and thus is formed a sort of partnership between the lender and the borrower, in which the one supplies capital, the other skill and experience: The one takes upon himself the perils of the sea, and the other compensates him by a share of the profits of the adventure. But, except in this respect, this contract has no resemblance to a regular partnership, having in it no community of capital, no community of loss (*c*).

Not now in use in this country.

Formerly the practice of borrowing money on bottomry and respondentia was more general in this country than it is at present. The immense capitals now engaged in every branch of commerce, render such loans unnecessary; and money is now seldom borrowed in this manner, but by the masters of foreign ships who put into our ports in need of pecuniary assistance to refit, to pay their men, to purchase provisions, &c. Sometimes officers and others belonging to ships employed in long voyages, who have the liberty of trading to a certain extent with the prospect of great profit, but without capitals of their own to employ in such trade, take up money on respondentia to make their investments: But even this, as I am informed, is now not very frequently done in this country.

(*a*) *Pothier*, h. t. n. 46; *Valin*, on art. 16, h. t.; *Emerig.* t. 2, p. 505.—(*b*) *Emerig.* t. 2, p. 397.—(*c*) *Sav.* Dict. h. t. *Casaregis* disc. 7, n. 2; *Emerig.* t. 2, p. 394.

The contract, which must always be in writing, is sometimes made in the form of a deed poll, called a bill of bottomry, executed by the borrower (*a*), sometimes in the form of a bond or obligation, with a penalty (*b*). But, whatever may be its form, it must contain the names of the lender and the borrower, those of the ship and the master; the sum lent, with the stipulated marine interest; the voyage proposed, with the duration of the risk which the lender is to run: It must shew whether the money be lent on the ship, or on goods on board, or on both; and every other stipulation and agreement which the parties may think proper to introduce into the contract (*c*).

It is usually either in the form of a deed poll or a bond.

It is essential to this contract that the marine interest be expressly reserved in it (*d*). *Straccha* (*e*), indeed, holds that, without this, the law would look upon the contract only as a simple loan, upon which the lender had gratuitously taken upon himself the perils of the sea. *Emerigon*, however, holds (*f*) that this being a contract founded in good faith, equity will supply the omissions occasioned by mistake or inadvertance; and that as the lender subjects himself to the perils of the sea, and the borrower reaps the fruits of the adventure, commutative justice requires that the former should receive, beside the legal interest of his money, a satisfaction for the risk he has run.

The marine interest must be expressly reserved in it.

Whether equity would supply the omission of this.

(*a*) Vid. Append. N°. VI.—(*b*) Vid. Append. N°. VII.—(*c*) Vid. *Pothier*, h. t. n. 30; *Emerig.* t. 2, p. 402.—(*d*) *Pothier*, h. t. n. 19.—(*e*) Introd. n. 24.—(*f*) t. 2, p. 406.

CHAP. II.

Of the Parties to this Contract.

Who may lend on bottomry.

THE parties to the contract of bottomry are the lender and the borrower. Of the former, it is ſufficient to ſay, that any perſon, who is in a capacity to contract, may lend money on bottomry.

Who may borrow.

With reſpect to the borrower, every perſon who has a veſted aſſignable property in a ſhip or cargo, may, by the general law of merchants, borrow money on bottomry or reſpondentia thereon, to the extent of his intereſt.

When the maſter may hypothecate the ſhip.

This contract ſeems originally to have ariſen from the practice of permitting the maſter of a ſhip, in a foreign country, to hypothecate the ſhip, in caſes of neceſſity, in order to raiſe money to refit (*a*). And it is eſſential to the ſafety of the ſhip and the ſucceſs of the voyage, that the maſter, in the abſence of the owners, ſhould have this power, which is, indeed, by the marine law, implied in his appointment (*b*).

He can only do this in the abſence of the owners.

But as the owners are preſumed to give entire authority to the maſter, only in their abſence, and for ſuch affairs as they cannot themſelves conveniently tranſact, he is not in fact maſter till after he ſets ſail. Till then, he is ſubject to their orders, and they have the power of diſmiſſing him at pleaſure; till then, therefore, he can tranſact no buſineſs of importance, but under their immediate directions (*c*). Hence, if the maſter borrow money on bottomry in the place where the owners reſide, without their expreſs authority, it can only affect his own intereſt on board.

Yet, if money borrowed where the owners reſide be laid out on the ſhip, the owners ſhall be liable for it.

Yet, it is ſaid that, if the money thus borrowed be beneficially employed in ſupplying the neceſſities of the ſhip, and in diſcharge of the owners, they are liable for the money thus laid out (*d*). But this liability muſt be underſtood as for money paid for their uſe, not upon the contract of bottomry.

(*a*) Vid. 2 *Bl.* Com. 458.—(*b*) Per *Holt*, C. J. in *Bernard* v. *Bridgeman*, Hob. 12.—(*c*) Conſolato del mare, ch. 236.—(*d*) *Vinnius*, ad ff. de exercit. § 4, p. 844.

Even

Even in a foreign country, and in the abſence of the owners, the maſter cannot take up money on bottomry, for any debt of his own (*a*), but only for the uſe of the ſhip, in caſes of neceſſity; and this muſt appear in the written contract, otherwiſe the lender will neither have a *lien* on the ſhip, nor an action againſt the owners. The maſter in ſuch caſe would be alone liable, though it ſhould appear that the money was ſpent in ſupplying the neceſſities of the ſhip (*b*). Hence it would ſeem that originally the lender was bound to ſee to the application of the money advanced by him, and that he was obliged to prove this, to entitle himſelf to recover againſt the owners. But, as the law now ſtands, if it appear that the money has been fairly and regularly lent to ſupply the neceſſities of the ſhip, the miſapplication of it by the maſter will not affect the claim of the lender, who will have his action againſt the owners and his *lien* on the ſhip, without proving that the money was properly applied. He has no reaſon to miſtruſt the maſter, whom the owners have employed. But if he be an accomplice in any fraudulent miſapplication of the money, the owners may impeach the contract upon that ground (*c*).

Even in a foreign country the maſter can only borrow money in caſe of neceſſity.

And this muſt appear in the contract.

But the lender is not bound to look to the due application of the money.

In a former part of this work (*d*), it was ſhewn that no *Britiſh* ſubject can legally trade with the enemies of the ſtate in time of war; and that even an inſurance upon ſuch trading is void. It was alſo ſhewn that the inſurance of the ſhips and effects of the enemy has, on ſeveral occaſions, been prohibited by ſtatute; and many arguments and authorities have been adduced to prove that, even at common law, ſuch inſurances are illegal. It is needleſs to repeat thoſe arguments here, every one of which applies with equal, if not greater, force, to prove that the lending of money to the enemy upon bottomry is illegal, if not highly criminal.

Whether money may be legally lent on bottomry to an enemy, in time of war.

(*a*) *Molloy*, b. 2, c. 2, § 4. Laws of *Oler*. art. 1, 22.—(*b*) ff. de exercit. art. 7, *Vinnius*, ad id. *Emerig*. t. 2, p. 434.—(*c*) *Loccen*. l. 2, c. 6. n. 12. *Emerig*. t. 2, p. 441.—(*d*) Sup. 70.

CHAP.

CHAP. III.

Of the Thing hypothecated.

Money may be lent on whatever may be inſured.

IT is a general rule that money may be lent on bottomry or reſpondentia, on whatever may be the ſubject matter of inſurance. It may be lent on the body, tackle, furniture, and proviſions of the ſhip, or upon all, or any part of the cargo; or upon both ſhip and cargo *(a)*.

The borrower may take the money on board with him.

But money may be borrowed on reſpondentia without hypothecating any thing. The borrower may, and frequently does, take the money on board with him in ſpecie, in order that he may employ it in trade in the courſe of the voyage; which, as has been already obſerved *(b)*, was probably the original intention of ſuch loans.

But the money, or its equivalent, muſt be expoſed to the perils of the ſea, at the riſk of the lender.

But it is of the eſſence of this contract that the money lent, or ſomething equivalent to it, be expoſed to the perils of the ſea, at the riſk of the lender. And the ſame reaſons of policy which forbid gaming inſurances equally apply to wagers in the form of bottomry loans. If the borrower has no effects on board; or having ſome, he borrows much beyond their value, and agrees to pay a high marine intereſt, this will afford a ſtrong ground to ſuſpect fraud, and that the voyage will have an unfortunate end. *Cum capitaneus, ad cambium receperit longe majorem pecuniæ ſummam quam fuerit riſicum ſuper navi exiſtens, præſumi debet ſiniſtrum fuiſſe doloſum (c).*

This practice reſtrained by ſtat. 2. C. 2, c. 11.

Our legiſlature long ſince found it neceſſary to reſtrain the miſchiefs reſulting from this practice, and therefore by ſtat. 16. C. II, c. 6, re-enacted and made perpetual by the ſtat. 22 C. II, c. 11, § 12, after reciting that,

(a) Pothier, h. t. n. 9.—*(b)* Sup. 634.—*(c) Caſaregis*, diſc. 62, n. 7; Vid. *Le Guidon*, ch. 19, art. 10.

"it

" Whereas it often happeneth that maſters and mariners " of ſhips having inſured or taken upon bottomry, greater " ſums of money than the value of their adventure, do " wilfully caſt away, burn, or otherwiſe deſtroy the ſhip " under their charge, to the merchants and owners " great loſs;" for the prevention thereof for the future, enacts, 'That if any captain, maſter, mariner, or other 'officer belonging to any ſhip, ſhall wilfully caſt away, 'burn, or otherwiſe deſtroy the ſhip unto which he be-'longeth, or procure the ſame to be done, he ſhall 'ſuffer death as a felon.'

Wagers, in the form of bottomry contracts, are permitted in ſome parts of *Italy*.

They are prohibited in *France*.

At *Legborn* and ſome other parts of *Italy*, where gaming inſurances are tolerated, wagers in the form of bottomry contracts are alſo allowed *(a)*.—In *France*, it was the wiſe policy of the framers of the famous ordinance of 1681, to prohibit all gaming and wagering upon the events of the maritime adventure; and therefore they did not only forbid all gaming inſurances, but alſo all wagers in the form of bottomry contracts. It is therefore provided *(b)* that, in caſe of loſs, the borrower upon goods ſhall not be diſcharged without proving that he had goods on board at the time of the loſs, on his own account, to the amount of the ſum lent.

And this ſpecies of gaming coming into uſe in *England*, the 19 *G.* II. c. 37, § 5, directs that, upon *Eaſt India* voyages the money ſhall only be lent on the ſhip or goods on board, with benefit of ſalvage to the lender.

In *England* it was not unuſual, before the ſtat. 19 *G.* II. c. 37, for perſons to borrow money *on the voyage*, as it was called; that is, where the borrower, having nothing, either in the ſhip or cargo which he could hypothecate, took up money on his own perſonal credit, and on the credit of his ſureties if he had any. The money thus borrowed was often taken on board, and uſually employed in ſome commercial adventure depending on the ſucceſs of the voyage; and therefore this might generally be conſidered as a legitimate loan upon reſpondentia. But the ſpirit of gaming having availed itſelf of this form of contract to cover wagers, particularly in long

(a) *Caſaregis*, diſc. 14, 15.—*(b)* Ord. de la mar. h. t. art. 3, 14; vid. *Emerig.* t. 2, p. 496, 500; *Valin*, on art. 3, 14. h. t.

voyages, the ſtat. 19 *G.* II. c. 37, after prohibiting inſurances without intereſt, declares (§ 5.), 'That all 'money lent on bottomry or at reſpondentia, upon any 'ſhip or ſhips belonging to any of his Majeſty's ſubjects, 'bound to or from the *Eaſt Indies*, ſhall be lent only on 'the ſhip, or upon the merchandizes on board, and ſhall 'be ſo expreſſed in the condition of the bond; and the 'benefit of ſalvage ſhall be allowed to the lender, who 'alone ſhall have a right to make inſurance on the money 'ſo lent; and in caſe it ſhall appear that the value of his 'ſhare in the ſhip, or the effects on board, does not 'amount to the full ſum or ſums he has borrowed as 'aforeſaid, ſuch borrower ſhall be reſponſible to the 'lender for ſo much of the money borrowed as he has 'not laid out on the ſhip or merchandize laden thereon, 'with lawful intereſt for the ſame, in the proportion the 'money laid out ſhall bear to the whole money lent, 'notwithſtanding the ſhip or merchandize ſhall be totally 'loſt.'

Whether a wager, in the form of a bottomry loan, be a legal contract at common law.

It is ſaid (*a*) that, as *Eaſt India* voyages only are mentioned in this act, and that as *expreſſio unius eſt excluſio alterius*, it follows that bottomry loans, where the borrower has nothing on board, may be legally made in all other caſes, as at common law, except in the caſes prohibited by the ſtat. 7. *G.* II. c. 21, § 2. (*b*).

It is certainly not a little ſingular that the ſame legiſlature which thought it neceſſary to prohibit ſuch loans upon *Eaſt India* voyages, ſhould not have thought the ſame prohibition equally neceſſary in all other caſes. Yet, I cannot, in this caſe, admit the application of the maxim, *expreſſio unius eſt excluſio alterius*. If, indeed, the maxim were, *excluſio unius eſt recognitio alterius*, it might be more applicable. But ſuch a maxim would have the effect of proving, that a ſtatute which ſhould be made to reſtrain one particular abuſe, would ſanction all others of the ſame nature; which is manifeſtly ab-

(*a*) *Park*, 411.—(*b*) Vid. inf. 643.

ſurd

ſurd. But, be this as it may, ſuch an inference is not ſufficient to prove that a ſpecies of gaming ſo miſchievous in its tendency had ever been ſanctioned by the common law. Nothing ſhort of a ſolemn deciſion of one of the ſupreme courts of *Weſtminſter*, could give to ſuch doctrine the ſtamp of authority; and I believe there has not yet been ſuch a deciſion.

The ſtat. 7 *G.* I. c. 21, prohibits the lending money on bottomry on foreign *Eaſt India* ſhips.

Many *Britiſh* ſubjects having, in the reign of *George* I., fitted out ſhips and clandeſtinely traded to the *Eaſt Indies* under colour of foreign commiſſions, the ſtat. 7 *G.* I. c. 21, § 2, made to reſtrain theſe practices, and to protect the monopoly of the *Eaſt India* company, amongſt other regulations, declares, 'That all contracts and agreements, 'made or entered into by any of his majeſty's ſubjects, 'or any perſon or perſons in truſt for them, for the loan 'of any money by way of bottomry, on any ſhip or 'ſhips in the ſervice of foreigners, and bound to, or de-'ſigned to trade in, the *Eaſt Indies*, ſhall be void.'

Whether this act reſtrains the lending of money to foreigners trading to their own ſettlements in *India*.

It is ſaid *(a)* that this act does not mean to prevent the king's ſubjects from lending money on bottomry on foreign ſhips, trading to their own ſettlements in the *Eaſt Indies*; and it muſt be owned that, from the preamble to the act, it would ſeem that it had only in view to reſtrain the illegal commerce of *Britiſh* ſubjects with the *Eaſt Indies*, without any reference to that of foreigners; yet the above clauſe expreſsly, and in the moſt unqualified terms, reſtrains the lending of money on bottomry on *any* ſhip or ſhips *in the ſervice of foreigners* *(b)*. Whether a ſhip, the property of *Britiſh* ſubjects, fitted out by them, and laden with their merchandize, can be ſaid to be *in the ſervice of foreigners*, merely becauſe ſhe is furniſhed with a commiſſion from a foreign ſtate, is a queſtion upon which there has not been yet any judicial deciſion.

It would ſeem that a reſpondentia bond for money lent by a *Britiſh* ſubject, upon goods on board an *American* ſhip, on a

In the year 1789 an action was brought in the court of Common Pleas, on a reſpondentia bond, executed by the defendant, an *American*, to ſecure the payment of a

(a) *Park*, 412.—*(b)* Vid. ſup. 631.

voyage from *Bengal* to *Rhode Iſland* is void.

Sumner v. *Green*, 1 H. Bl. 301.

cargo of goods ſhipped by the plaintiff, a *Britiſh* ſubject at *Calcutta*, on board an *American* ſhip, homeward bound, from *Calcutta* to *Rhode Iſland*. The ſhip had ſailed from *England* and landed a cargo of *European* goods in *Bengal*, previous to her taking in the cargo, on which the bond was given.—The defendant, being arreſted on the bond, moved to be diſcharged out of cuſtody on entering a common appearance, on the ground that, ſince the independence of the *United States*, an *American* ſhip was a *foreign ſhip*, within the meaning of the above ſtat. 7 *G.* I. c. 21, § 2.—The court diſcharged the defendant.—Lord *Loughborough* ſaid,—"We do not think it neceſſary, upon this application, to give any decided opinion upon this act; but it would be improper to hold the defendant in cuſtody, if there appears a probable ground that the contract which is the foundation of the action is void. I do not chuſe to enter into the conſtruction of the ſtatute; but I think it probable that, in its true meaning, it would reach all trading to the *Eaſt Indies* for the purpoſe of ſending goods to other parts of the world, contrary to the proviſions of the company's charter."

Money may be borrowed on freight.

By the law of *England*, freight, as we have already ſhewn (*a*), may be inſured, and conſequently it may be hypothecated upon a bottomry contract.

In *France* money cannot be borrowed on *freight*, or on *profit*.

In *France* the borrowing of money by the owners of a ſhip, on freight not earned, is prohibited (*b*). The reaſon, as *Valin* informs us (*c*), is, becauſe the lender would be at the mercy of the borrower, who would not much concern himſelf about freight, from which he could derive no profit. But it is permitted to borrow money on freight already earned; that is, where the money borrowed is to be employed by the *affreighter*, in paying freight which he is bound to pay at all events. Freight, in that caſe, being an expence which the affreighter muſt loſe if the ſhip ſhould be loſt without completing her voyage, is a proper ſubject of inſurance, and conſequently of a bottomry loan (*d*). Nor is

(*a*) Sup. 75.—(*b*) Ord. de la mar. h. t. art. 4.—(*c*) *Valin* on art. 4, h. t.—(*d*) Vid. ſup. 75, 76.

it

it permitted by the *French* law to borrow money on bottomry on the profits expected upon goods, becauſe profit is uncertain, and has no phyſical or ſubſtantial exiſtence on board (*a*).

Seamen may undoubtedly borrow money on any goods they may have on board; becauſe, as far as relates to ſuch goods, they are in the ſame ſituation as thoſe of any other ſhipper. As to their *wages*, the ſame reaſons of policy, drawn from the neceſſity of intereſting them in the preſervation of the ſhip, which prohibit their being inſured, equally forbid their borrowing money on them (*b*).

Seamen may borrow money on their goods on board; but not on their wages.

Whether money may be lent on a ſhip or goods already expoſed to the perils of the ſea, is a queſtion upon which ſome learned men have differed.—*Valin* (*c*) holds, that it makes no difference whether the loan be made before the ſhip's departure or afterwards; becauſe, ſays he, the preſumption is, either that the money has been uſefully employed in the things put in riſk, or in paying what was due on that account.—*Emerigon* (*d*), on the contrary, ſuppoſes that the original idea of bottomry was, that the money borrowed ſhould be beſtowed on the ſhip, or veſted in goods for exportation (*e*); and that, upon this principle, this ſpecies of loan has been permitted and encouraged: But that, as ſoon as the ſhip ſets ſail the motive to this ceaſes; and a loan, after the ſhip's departure, could not be ſaid to have purchaſed the goods already expoſed to the perils of the ſea.—This is plauſible, but *Valin*'s reaſoning ſeems the moſt ſatisfactory.

Whether money may be lent on a ſhip or goods already in riſk.

(*a*) Ord. de la mar. h. t. art. 4, *Pothier*, h. t. n. 14. *Emerig.* t. 2, p. 480. Vid. ſup. 78. Vid. *Bynk.* quæſt. jur. priv. lib. 4, c. 5, in which he cites a deciſion of the ſenate of *Rotterdam*, to ſhew that *lucrum quod ſperatur, per leges nauticas, aſſecurari non poſſe.*—(*b*) *Emerig.* t. 2, p. 480.—(*c*) On art. 16, tit. *de la ſaiſie*, t. 1, p. 346.—(*d*) Tom. 1, p. 484.—(*e*) Trajectitia ea pecunia eſt quæ trans mare vehitur:—Sed videndum an merces ex eâ pecuniâ comparatæ, in eâ cauſâ habeantur; et intereſt, utrum etiam ipſæ, periculo creditoris, navigent; tunc enim trajectitia pecunia fit. ff. de naut. fœn. 1.

CHAP. IV.

Of the Principal, and marine Intereſt.

Of what the loan may conſiſt.

TO conſtitute this contract, one party muſt lend the other a ſum of money upon the uſual conditions. Not that this contract could only be made upon a loan of money; for, as a loan, it may conſiſt, according to the *Roman* law, of all thoſe things *quæ pondere, numero, et menſurâ conſtant, et quæ uſu conſumuntur* (*a*). In practice, however, ſuch loans are ſcarcely ever made but in money (*b*). *Emerigon*, indeed, mentions an inſtance of a loan of ſix dozen of *Morocco* ſkins, which were lent on *reſpondentia*, and a ſecurity given for the ſum at which they were valued, with marine intereſt at *cent. per cent. (c)*.

The principle upon which marine intereſt is allowable.

Bottomry, as has been already obſerved, differs from a ſimple loan in this, that, in the latter, the borrower takes the riſk upon himſelf, and muſt repay the money at all events; whereas the lender on bottomry takes on himſelf the riſk ariſing from the dangers of the ſea, and is only to be repaid in the event of a ſafe arrival. He may therefore legally ſtipulate that, in the event of a ſafe arrival, he ſhall be paid, beſide the ſum lent, not only a compenſation for the *uſe* of his money, but alſo the price of the riſk. And as it is impoſſible to fix any rule by which this can be preciſely aſcertained, it muſt in all caſes be ſettled by the agreement of the parties (*d*). *Trajectitia pecunia, propter periculum creditoris; quamdiu navigat navis infinitas uſuras recipere poteſt (e)*. *Juſtinian*, however, after prohibiting the *centeſima* (which was one *per cent. per* month, or twelve

(*a*) ff. l. 2, de reb. cred. § 1.—(*b*) *Pothier*, h. t. n. 8.—(*c*) *Emerig.* t. 2, p. 412.—(*d*) Vid. *Pothier*, h. t. n. 2.—(*e*) *Paul.* ſent. 3, 11, 14

per cent. per annum), in ordinary caſes, permitted it in this contract, and forbid any higher intereſt *(a)*. —Such a rule might have been proper in a country where navigation was confined to mere coaſting voyages, and where the principal difference between the riſk of one voyage and another conſiſted in the time in which each might be performed. But, in modern times, when commerce is carried on between countries the moſt remote from each other, it would be impoſſible to fix any preciſe ſtandard by which the rate of marine intereſt could be properly regulated.

Legality of it.

The marine intereſt, therefore, however high or exorbitant it may ſeem, cannot be deemed uſury, provided the money lent be *bonâ fide* put in riſk. Several attempts, however, have been made to call in queſtion the legality of ſuch contracts; but, in every inſtance, the courts, both of law and equity, have held that if the principal be *bonâ fide* put in riſk, the contract is legal, however high the marine intereſt reſerved may be (*b*).—If, indeed, the form of a bottomry or reſpondentia loan be uſed as a cloak to an uſurious contract, there can be no doubt but that it would be illegal and void.

It is only due where the riſk has been commenced.

It is of the eſſence of this contract that the ſum lent be put in riſk; and it does not, in truth, become a bottomry or reſpondentia contract, till the riſk commences. Therefore, by the *Roman* law, if the borrower had ſpent the money on ſhore, and did not expoſe it to the perils of the ſea, it was not deemed bottomry, but only a ſimple loan at common intereſt (*c*). And by the general law of merchants, at this day, the contract of bottomry, like that of inſurance, is merely *executory*, till the riſk has

If the riſk be not commenced, the contract will become a ſimple loan; even

(*a*) Cod. lib. 4, tit. 32, de uſur. 26.—(*b*) R. *Sharpley* v. *Hurrell*, *Cro.* J. 208; Per *Doddridge*, J. in *Roberts* v. *Trenayne*, *Cro.* J. 508; R. in *Joy* v. *Kent*, *Hard.* 418: R. in *Soome* v. *Gleen*, 1 *Sid.* 27, 1 *Lev.* 54; Vid. *Dandy* v. *Turner*, 1 Eq. Ca. Ab. 372; R. *De Guilder* v. *Depeiſter*, 1 *Vern.* 236; R. Anon. 2 Ch. Ca. 30.—(*c*) ff. de naut. fæn. 1.

though the borrower covenant to perform the voyage.

been commenced; and the borrower, like the inſured, may, at his pleaſure, by giving up the voyage propoſed, or by not ſhipping the goods on which the money was lent, prevent its ever taking effect. For, however it may have happened, that the riſk was never commenced, it is ſufficient that this has happened, to turn the contract into a ſimple loan, at common intereſt. The marine intereſt can only be due in reſpect of the principal having been actually put in riſk; nothing elſe can give the lender a legal claim to it. And this is ſo, even where the borrower covenants to perform the voyage mentioned in the contract within a limited time (a).

De Guilder v. *De Peiſter*, 1 *Vern.* 263.

Therefore, where the borrower was bound, in conſideration of 400 l., the ſum lent, to perform the voyage mentioned in the bond, within ſix months; and alſo, at the expiration of that time, to pay the 400 l. and 40 l. premium, in caſe the veſſel arrived ſafe; and it happened that the ſhip never ſailed on the voyage, whereby the bond became forfeited.—The borrower brought his bill in equity to be relieved; and it was there decreed, that, as there had been no hazard of loſing the principal, the lender muſt give up the premium, and be content with his principal and *ordinary intereſt*.

What allowance ought to be made to the lender, where the riſk has not been commenced.

To the ſimple intereſt payable, in ſuch caſes, on the ſum borrowed, *Valin* (b), by analogy to the practice in caſes of inſurance, holds that one half *per cent.* upon the marine intereſt, ought to be paid by the borrower who has failed in the contract, in caſe the lender has inſured his principal.—*Emerigon* (c) approves this; but adds, that if the borrower be not in fault, it will be ſufficient to repay the ſum lent, with the ordinary intereſt. To me it ſeems but reaſonable that the lender ſhould, in every ſuch caſe, receive not only his principal and intereſt, but alſo one half *per cent.* upon the marine intereſt, and all charges of inſurance.

(a) *Pothier*, h. t. n. 38, 39. *Valin* on art. 15, h. t.; *Emerig*, t. 2, p. 494.—(b) On art. 15, h. t.—(c) Tom. 2, p. 496.

In

In general, as ſoon as the riſk ceaſes, (*diſcuſſo periculo*,) either by the ſhip's ſafe arrival, the expiration of the term, or any other event, the marine intereſt ceaſes, and the debt becomes abſolute. From that time, if the borrower delays payment, it bears only ordinary intereſt (*a*).

When the riſk ceaſes, the marine intereſt ceaſes.

If the contract be for a certain number of months, either at a ſpecific ſum, or at ſo much *per* month, and ſo at that rate, for any longer time, not exceeding a fixed period; and the voyage be performed within the period firſt limited, the marine intereſt for the whole of that period, will nevertheleſs be due: But if it exceed the latter period, the riſk of the lender will ceaſe, and the debt become abſolute, though the voyage ſhould not be ended. *Poſt diem præſtitutam, et conditionem impletam, periculum eſſe creditoris definet* (*b*).

When the time of the riſk is limited, the riſk and the marine intereſt will end with the time, though the voyage be not ended.

And this holds even where the ſhip has been prevented by inevitable accident, from performing her voyage within the time limited.—As where money was lent on bottomry, with a condition, that if the ſhip, which was bound to the *Eaſt Indies*, ſhould return to *London* within 36 months, or if ſhe ſhould not return within that time, and ſhould not be taken or loſt within that time, the money to be paid, &c. *The ſhip was detained at* Surat *in* India, *by an embargo laid by the* Mogul, *till after the* 36 *months were elapſed, and in her return home was taken*; ſo that the bond was forfeited. But there being no fault in the maſter, and the voyage being thus delayed by inevitable accident, the borrower brought his bill to be relieved againſt the penalty of the bond.—But Lord *Harcourt*, Ch. ſaid,—"I cannot relieve in this caſe, againſt the expreſs agreement of the parties.—If the lender has inſured this money upon the ſhip, the borrower ſhall have the benefit of the inſurance, upon allowing the lender the charges of the inſurance, and paying him the money in three months."

And the riſk of the lender will ceaſe, though the ſhip was prevented by inevitable accident from performing her voyage within the time limited.

Ingledew v. *Foſter*, 4 *Vin.* Ab. 281.

(*a*) ff. de naut. fœn. 4.—(*b*) ff. ut. ſup.

Emerigon

If the marine intereſt be agreed to be paid for the firſt ſix months, though the ſhip ſhould be loſt; whether this be a legal contract.

Emerigon puts a caſe, where it is ſtipulated that 12 *per cent.* ſhall be paid for the firſt ſix months; and that this ſhall be payable, *though the ſhip ſhould be afterwards loſt.* And he ſeems to be of opinion that, if the ſhip be loſt after the ſix months, the lender is not entitled to the ſix months' intereſt.—He ſays that if the borrower had remitted the intereſt for the firſt ſix months, the lender might fairly receive it; but that, if he ſhould not, from the profits of his trade, have been enabled to do this, he would be diſcharged from all obligation (*a*).—This diſtinction is founded on principles much too vague and indefinite to be received as law. With us, the contract would not be uſurious, becauſe the ſum lent would be put in hazard; and being legal, it would be binding upon the borrower, whatever might be the ultimate ſucceſs of the adventure. In ſuch a caſe, the firſt ſix months would be conſidered as a diſtinct riſk.

Common intereſt begins to run on the principal, as ſoon as the riſk ends.

If, when the ſea-riſk is ended, the borrower delays payment, the common intereſt begins to run, *ipſo jure*, without any demand. *Diſcuſſo periculo majus legitimâ uſurâ non debebitur* (*b*). But this intereſt runs only on the principal, not on the marine intereſt; for this would be intereſt upon intereſt: *Acceſſio acceſſionis non eſt* (*c*).

(*a*) *Emerig.* t. 2, p. 518.—(*b*) ff. de naut. fœn. 4.—(*c*) *Pothier*, h. t. n. 51.; *Emerig.* t. 2, p. 414.

CHAP.

CHAP. V.

Of the Perils or Riſks to which the Lender is liable.

It is eſſential to this contract, that the lender run the ſea-riſk.

IT is eſſential to this contract, not only that the money be lent on a ſhip or goods, but likewiſe that theſe be expoſed to the perils of the ſea, at the riſk of the lender; that is, that the repayment of the ſum lent, and the marine intereſt, ſhall depend on the ſafe arrival of the ſhip (*a*). The perils of the ſea, in a large ſenſe, comprehend all thoſe accidents and misfortunes to which ſhips at ſea are expoſed, and which no human foreſight or precaution can avert or reſiſt; *Vis divina, quæ præcaveri, & cui reſiſti, non poteſt.* This idea ſeems to be very fully expreſſed in the uſual terms of our bottomry and reſpondentia contracts; by which it is provided that, '*if, in* '*the courſe of the voyage, and within the time preſcribed, an* '*utter loſs of the ſhip, by fire, enemies, men of war, or any* '*other caſualties, ſhall unavoidably happen,*' the bond ſhall be void, and the borrower diſcharged. So that the perils to which the lender is expoſed, are nearly the ſame as thoſe to which the underwriters upon a policy of inſurance are liable (*b*).

The perils are nearly the ſame as in inſurance.

A loſs by pirates is within the contract.

Though a loſs by pirates is not uſually expreſſed in bottomry or reſpondentia ſecurities; yet this is a riſk within the meaning of the words; piracy being one of the *caſualties* to which ſhips at ſea are liable (*c*).

But

(*a*) *Pothier*, h. t. n. 16, 38.—(*b*) Vid. *Le Guidon*, ch. 18, art. 2. *Valin* on art. 11, h. t. and on art. 6, tit. *des aſſurances*; *Pothier*, h. t. n. 16. Vid. ſup. 416.—(*c*) R. in *Barton* v. *Wolliford*, *Comb.* 56. But this was not a queſtion upon a bottomry contract, as has been ſuppoſed. *Park* 421. It aroſe in an action on a bill of lading, to which the defendant pleaded

Nothing ſhort of a total loſs will diſcharge the borrower.

But whatever may be the perils to which the lender is liable, nothing ſhort of a total loſs will diſcharge the borrower. The obligation remains, however the goods may be damaged by the perils of the ſea. Nor is there any deduction on account of ſuch damage; for the lender is not bound to contribute to ſimple average or particular damage, unleſs by expreſs agreement. In this reſpect, the lender on bottomry is in a better ſituation than an inſurer, who is obliged to indemnify the inſured, to the extent of the ſum inſured, from all damage ariſing from any of the perils inſured againſt. A capture, therefore, to have the effect of diſcharging the borrower, muſt be ſuch a taking and detention as would amount to a total loſs in a caſe of inſurance: A mere temporary detention will not diſcharge the borrower, unleſs the voyage be thereby loſt.

A ſhip is captured and detained for a month, re-captured and carried to a port out of the courſe of the voyage, reſtored on payment of ſalvage, and at laſt arrives at her port of deſtination: The borrower is not diſcharged.

Joyce v. *Williamſon*, B. R. Mich. 23 G. III. MS.

Thus:—An action was brought on a bottomry bond, on a voyage from the *Tagus* to *New York*; and the condition of the bond was, that if, upon the ſhip's arrival at *New York*, the defendant ſhould pay the plaintiff the ſum lent, with the ſtipulated intereſt; or if the ſhip ſhould be loſt, taken by the enemy, miſcarry, or be caſt away, the bond to be void, otherwiſe to remain in force.—The defendant pleaded, 1ſt. *Non eſt factum*; 2dly. That the ſhip did not arrive ſafe at *New York*; 3dly. That the ſhip was captured by the enemy.—Iſſue was joined upon the the two firſt pleas; and to the third the plaintiff replied re-capture. Iſſue being joined on this replication, it appeared upon the trial, that the ſhip was taken on her paſſage to *New York*, detained for a month, and plundered of her ſtores; that ſhe was then retaken by an *Engliſh* privateer, and carried into *Halifax*; where the court of admiralty decreed that ſhe ſhould be reſtored to the original owners, on payment of ſalvage, which was

pleaded piracy; and upon demurrer to this plea, it was contended, that robbery is no more an excuſe to a maſter of a ſhip than to a common carrier: But the court held that piracy was an excuſe in this caſe, being one of the dangers of the ſeas.

raiſed

raiſed by ſale of part of the cargo; that after a conſiderable repair there, ſhe ſailed for *New York*, where ſhe arrived with the remainder of her cargo, and earned her freight: That the ſhip and freight were then worth the ſum mentioned in the bond; but not worth that ſum, and the ſum laid out in repairs.—There was a verdict for the plaintiff, and the court, upon a motion for a new trial, determined that the verdict was right, and the plaintiff entitled to recover.—Lord *Mansfield*, in delivering the opinion of the court, ſaid;—"It is clear that, by the law of *England*, upon a bottomry contract, there is *neither average nor ſalvage*. It has been contended on the part of the defendant, that this caſe is within the ſaving words, that, in caſe of loſs by *capture*, the bond ſhould be void; and that here was a capture and detention for a month. But, upon conſideration, we are all of opinion, that a taking, within this condition, does not mean a temporary taking, which is only an obſtruction which may laſt for a day, it muſt be ſuch a taking as, between inſurer and inſured, would amount to a *total loſs*. But this was not ſuch a capture. The voyage was not loſt; for the ſhip arrived at her port of deſtination and earned her freight: And as freight depends on the ſafety of the ſhip, the ſhip muſt have *arrived ſafe* to have earned her freight. Either way there muſt be a hardſhip; but the law allows no average or ſalvage in bottomry bonds."

"No loſs will have the effect of avoiding the contract, or diſcharging the borrower, but a total loſs proceeding from the perils of the ſea, during the voyage, and within the time ſpecified in the contract. *Creditor ſubit periculum navigationis in caſibus fortuitis tantum (a)*. But no loſs ſhall be reputed to have ariſen from the perils of the ſea, which aroſe from the internal defect of the thing hypothecated. As where a ſhip is not ſea-worthy, and periſhes from age, rottenneſs, or other ſuch cauſe; or

The lender is not liable for loſs proceeding from the internal defect of the thing, unleſs by expreſs ſtipulation.

(a) *Roccus de navib.* n. 51.

where

where goods periſh of themſelves, liquors run out through the defect of the caſks; dry goods heat and ferment by length of time *(a)*, &c. *Valin (b)* ſeems to condemn, as illegal, any clauſe by which the lender is made liable for loſs occaſioned by the internal defect of the thing. But *Emerigon (c)* holds, that the lender may, by expreſs ſtipulation, make himſelf liable for ſuch loſſes, provided the cauſe did not exiſt before the ſhip's departure.

He is not liable for the act of the owners or maſter of the ſhip.

The act of the owners of the ſhip, of the maſter, or of the borrower, is not a peril at the riſk of the lender. *Qui ſuſcipit in ſe periculum navigationis, ſuſcipit periculum fortunæ, non culpæ (d).* As if the voyage be changed by order of the owners of the ſhip; or if a loſs happen by the barratry of the maſter, or by the miſconduct of the merchant; this will not diſcharge the borrower. *Si infortunium vel naufragium, ex culpa debitoris proceſſerit, tunc creditor non tenetur de periculo et damno in quod incurritur, ex culpa vehentis aut alterius (e).* This is the general rule; but, by expreſs ſtipulation, the lender may be made liable for every loſs not occaſioned by the act of the borrower *(f)*.

Nor for a loſs by ſmuggling, unleſs he was privy to it.

If the ſhip be forfeited, or the goods confiſcated, for ſmuggling, in which the lender had no concern, he is not liable for the loſs; for this does not ariſe from the perils of the ſea, but from the lawleſs avarice and temerity of the borrower. *Non ex marinæ tempeſtatis diſcrimine, ſed expræcipiti avaritiâ, et incivili debitoris audaciâ (g).*—Yet it is ſaid, that if the lender was privy, and conſenting to the contraband trade in which the money was to be employed, he ſhall be liable for the loſs. *Si ſciente, et conſentiente illo fiat, conſenſus jus facit.* (*h*)—In *England*, if the money were lent to be employed in a trade prohibited by law; the contract would be abſolutely

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(*a*) Ord. de la mar. h. t. art. 12. *Emerig.* t. 2, p. 509. *Pothier*, h. t. n. 34.—(*b*) On art. 12, h. t.—(*c*) Tom. 2, p. 509.—(*d*) ff. de naut. fœn.—(*e*) *Roccus* ne navib. n. 51.—*(f)* Vid. *Emerig.* t. 2, p. 510.—(*g*) ff. de naut. fœn. 3.—(*h*) *Kuricke*, tit. 6, p. 762. Vid. *Valin* on art. 12, h. t.

void;

void; and the ſum lent could never be recovered from the borrower, even though no loſs had happened (*a*).

If the ſhip do not ſail on the voyage deſcribed, or deviate without neceſſity, the lender will be diſcharged from the riſk.

The lender, like an inſurer, is only anſwerable for loſſes which happen within the time and place of the riſk, as ſpecified in the contract. Therefore, if the ſhip deviate from the voyage, without neceſſity, the lender will not be liable, any more than an inſurer, to any loſs that may afterwards happen (*b*). Upon this ſubject I would refer the reader to the chapter on deviation, in caſes of inſurance (*c*), the doctrine of which is equally applicable to the preſent ſubject.

Our courts, both of law and equity, have adopted the ſame principle in ſeveral inſtances.

A ſhip is loſt after a wilful deviation, the lender is not liable.

Weſtern v. Wildy, Skin. 152.

Thus:—The plaintiff lent 500 l. upon the hull of a ſhip, and the defendant covenanted to pay, if the ſhip went from *London* to *Bantam*, and returned from thence directly to *London*, within 12 months, 550 l.; if from *London* to *Bantam*, and from thence to *China* or *Formoſa*, and returned to *London* within 24 months, 650 l.; and if ſhe returned not within 24 months, then to pay 5 l. *per* month above the 650 l., till 36 months; and if ſhe returned not within 36 months, then to pay 710 l., unleſs it could be proved that the ſhip was loſt within the 36 months.—The ſhip went from *London* to *Bantam*, and from thence to *Surat* and other parts, and ſo returned to *Bantam*; and in her voyage from *Bantam* to *London*, was loſt within 36 months.—In an action upon the bond; after a ſeries of long and intricate pleadings, the above facts appeared upon demurrer.—The court inclined to think, that, by reaſon of the deviation in going to *Surat*, the plaintiff was diſcharged from the riſk, and therefore entitled to recover; and after time taken to deliberate, they adjudged accordingly (*d*).

If the ſhip be preſſed into the King's ſervice, this will excuſe a deviation; but if the borrower allege a deviation, this muſt

So, where, to an action upon a bottomry bond, the defendant pleaded, that the ſhip went from *London* to

(*a*) Vid. ſup. book 1, ch. 3, § 1, 2.—(*b*) *Pothier*, h. t. n. 18. *Emerig.* t. 2, p. 522.—(*c*) Sup. 392.—(*d*) Vid. Anon. 1 Eq. Ca. Abr. 372, 2 Ch. Ca. 130.

Barbadoes

be explicitly denied.

Williams v. *Stedman*, *Skin.* 345; *Holt's* Rep. 126. S. C.

Barbadoes, *ſine deviatione*, and afterwards, on her return from *Barbadoes* towards *London*, ſhe was loſt *in viagio predicto*: The plaintiff replied, that the ſhip, in her return, went from *Barbadoes* to *Jamaica*; and that after a ſtay there, ſhe ſailed from *Jamaica* for *London*, and was loſt; and ſo ſhews a deviation: The defendant rejoined, that ſhe was preſſed into the King's ſervice, and ſo was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; *abſque hoc*, that ſhe deviated after ſhe was preſſed. Upon demurrer to this rejoinder, the plaintiff had judgment.—The court held that the plea of the defendant was not good; for he alledged that the ſhip went from *London* to *Barbadoes*, without deviation, and that, in her return from *Barbadoes* to *London*, ſhe was loſt *in the voyage aforeſaid*; but did not ſhew, *without deviation*. And as the condition was ſo in expreſs words, the defendant ought to have ſhewn expreſsly that he had performed it according to the words.

Changing the ſhip without neceſſity, diſcharges the lender.

So where money is lent on goods, on board a certain ſhip, the lender is only conſidered as liable for the riſk on thoſe goods while they are on board that ſhip; and if they be removed to another ſhip, without neceſſity, the lender will be diſcharged (*a*).—But if the change be occaſioned by any neceſſity, he will ſtill continue liable. As if the firſt ſhip be preſſed into the king's ſervice, or be declared unnavigable, &c.; the borrower may load the goods on board another veſſel at the riſk of the lender, and the increaſe of freight, &c. will be a general average, to which the lender will be liable (*b*).

Duration of the riſk.

Money is generally lent for the whole voyage, outward and homeward; or for either ſeparately; or for a limited time. The contract uſually ſpecifies the commencement and end of the riſk; and any misfortune happening before or after, is at the riſk of the borrower (*c*). If the voyage be deſcribed in the bond; but

(*a*) *Pothier*, h. t. n. 18; *Emerig.* t. 2, p. 524.—(*b*) *Emerig.* ut ſup. Vid. ſup. book 1, ch. 11, § 2.—(*c*) Vid. *Valin*, on art. 13, h. t. *Emerig.* t. 2, p. 514.

the

the time of the commencement and end of the riſk be not ſpecified, the riſk, as to the ſhip, ſhall commence from the time ſhe ſets ſail, and continue till ſhe anchors in ſafety at her port of deſtination; and, as to goods, from the time they are ſhipped, till they are ſafely landed (*a*).

When the loan upon goods is both for the outward and homeward voyages, the lender continues liable to the riſk during the homeward voyage on the goods, by which thoſe have been replaced on which the money was lent (*b*).

(*a*) Vid. ſup. book 1, ch. 6, § 5.—(*b*) *Pothier*, h. t. n. 34.

CHAP. VI.

Whether the Lender be liable to general Average.

By the general law of merchants, the lender is liable to general average.

THERE is this difference between inſurance and bottomry, that an inſurer, unleſs he ſtipulate to be free of particular average, is always liable to that charge; whereas a lender is not liable to it, unleſs by expreſs ſtipulation: But, by the general law of merchants, in caſe of groſs or general average, the lender ſhall contribute to diſcharge the borrower (*a*): The reaſon of this difference is, that particular average in no degree contributes to the ſafety of the ſhip; whereas it is to thoſe ſacrifices which are the ſubject of general average, that the lender owes the preſervation of his money, which, without ſuch ſacrifices, would be loſt with the ſhip (*b*).

The nature of the contract ſeems to require this.

Foreign writers even hold that a ſtipulation on the part of the lender, to be free of general average, would be abſolutely void, as being inconſiſtent with the nature of the contract, contrary to good policy, and injurious to the intereſts of the lender himſelf, who muſt loſe all, if the ſhip be loſt (*c*). Indeed the nature and object of bottomry contracts, ſeem, of themſelves, to require that

(*a*) 'L'argent à profit n'eſt contribuable en aucune avarie, 'reſervé qu' aux rachapts, compoſitions, et jets faits pour la 'ſalvation du total, et pour le ſoulagement ou l'évaſion, des 'dangers.' *Le Guidon*, ch. 19, art. 5.—'Ce qui eſt fort juſte,' ſays *Cleirac* in his commentary on this paſſage, 'afin que cette 'groſſe uſure paſſe au paroiſſe, Penſatio vel *æquamentum periculi*, 'comme dit *Du Moulin* ſur la loi *periculi pretium*. *Dig. De nautico* '*fœnore*, en ſon traité, *Contract. uſur.* quæſt. 3 *de trajectitiis*. 'L'argent a profit ne charge pas le navire mais l'affecte par hypo-'théque, laquelle ne ſubſiſte que par la ſalvation d'iceluy; c'eſt 'quoy il eſt raiſonnable que la dite hypothéque contribuë à ce 'qui concerne la conſervation du total, ou de ſon ſujet, *Ut omnium in tributione ſarciatur quod pro omnibus datum eſt.*' Vid. *Pothier*, h. t. n. 42, 47.—(*b*) *Emerig.* t. 2, p. 505.—(*c*) Conſult on this point *Valin*, on art. 16, h. t.; *Pothier*, n. 46; *Emerig.* t. 2, p. 505.

the lender ſhall be liable for general average. The borrower generally takes up the money becauſe he has not a capital of his own upon which he can carry on his trade. Knowing that it would be impoſſible for him to repay the ſum borrowed, but in the event of a fortunate return, he means to run no riſk, and agrees to part with a large ſhare of his profits, to be free from all perſonal reſponſibility. But if he ſhould be held liable to general average, then, by taking up money in this way, he muſt engage in a game of hazard, perhaps without being aware of his danger, in which he may eventually be ruined.

Whether by the law of *England*.

It has been ſaid, however, by a very diſtinguiſhed judge, that, "*by the law of* England, *there is neither average nor ſalvage upon bottomry contracts (a).*" And this doctrine, ſo far as it relates to average, has been ſince adopted by another noble perſon, no leſs eminent for his learning and abilities (*b*). I have anxiouſly ſought, however, but ſought in vain, to find any decided caſe, or authority in the law, which could warrant this doctrine.—I cannot agree with a learned writer (*c*) on this ſubject, that the ſtat. 19 *G.* II. c. 37, § 5 (*d*), which provides that the benefit of ſalvage ſhall be allowed to the lender, on *Eaſt India* voyages, concluſively proves that there was neither average nor ſalvage upon bottomry contracts at common law.—I never could look upon that act as having introduced any new principle into the law either of inſurance or bottomry contracts. On the contrary, it ſeems to me, after the beſt conſideration I have been able to give the ſubject, that it merely reſtored them to their original and only proper uſe, from which a ſpirit of gaming had been ſuffered to pervert them. I cannot even admit that, becauſe the ſtatute gives the benefit of ſalvage to the lender upon *Eaſt India* voyages, therefore he was not entitled to this at common law. As well might it be ſaid, that becauſe the inſurance of enemy's property, in time of war,

(*a*) Per Lord *Mansfield* in *Joyce* v. *Williamſon*, ſup. 652.—(*b*) Per Lord *Kenyon* at N. P. in *Walpole* v. *Ewer*, inf. 669.—(*c*) *Park*, 423.—(*d*) Sup. 104.

has been occaſionally prohibited by ſtatute, therefore the inſurance of enemy's property is a legal contract at common law (*a*).—But even admitting the inference, that becauſe the ſtatute gives the *benefit of ſalvage* to the lender upon *Eaſt India* voyages, therefore he was not entitled to this at common law; does it from thence follow that he was not liable to *general average* at common law? The ſtatute no where mentions general average.

If the inſured upon a reſpondentia intereſt on a foreign ſhip be obliged to contribute to a general average, the underwriters will be liable.

But whatever may be the true rule of law which ought to prevail on this ſubject, it has been determined, that if an inſurance be made in *England* upon a reſpondentia intereſt upon a *foreign ſhip*, and it appear that the lender is liable by the law of the country to which the ſhip belongs, to contribute to a general average; the underwriters upon the policy will be liable for ſuch contribution.

Walpole v. *Ewer*, at N. P. after Tr. 1789, *Park* 423.

Thus:—Where a reſpondentia loan on a *Daniſh* ſhip and goods was inſured in *England*, and an average loſs was ſuſtained upon the goods to the amount of 61 l. 15 s. *per cent.* to which the holder of the reſpondentia bond was obliged to contribute. He brought his action againſt the *Engliſh* underwriters to recover the amount of this contribution.—Lord *Kenyon*, who tried the cauſe, ſaid,—"By the law of *England*, a lender upon *reſpondentia* is not liable to average loſſes; but is entitled to receive the whole ſum advanced, provided the ſhip and cargo arrive at the port of deſtination. The plaintiff contends that as, by the law of *Denmark*, ſuch lenders are bound to contribute to average loſſes, according to the amount of their intereſt, the inſurer here muſt anſwer to them. The *Daniſh* conſul has proved that he received a judgment of the court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has ſtated it. The opinions of ſeveral men of eminence in that country have been offered on each ſide: But I reject them, becauſe the ſolemn deciſion of a court of competent juriſdiction is of much greater weight than the

The deciſion of a foreign court of competent juriſdiction is the beſt evidence to ſhew what the law of the country is.

(*a*) See this ſubject fully conſidered, ſup. book 1, ch. 2, § 1.

opinions

opinions of advocates, however eminent, or even the extrajudicial opinions of the moſt able judges. It ſeems as if, in this caſe, the underwriters were bound by the law of the country, to which the contract relates."—The jury found a verdict for the plaintiff (*a*).

(*a*) Vid. the caſe of *Newman* v. *Cazalet*, *Beawes* lex merc. 349, where an inſured had been obliged by the judgment of a foreign court to pay a larger average contribution than by the law of *England* could have been demanded, but it appeared to have been cuſtomary in adjuſting loſſes to allow the whole of ſuch contributions; Mr. Juſtice *Buller* at N. P. ruled that if the uſage were clearly proved, it ought to govern.

CHAP. VII.

Whether the Lender be entitled to the Benefit of Salvage.

The ſtat. 19 G. II. c. 37, gives the benefit of ſalvage to lenders on *Eaſt India* voyages.

THE proviſion of the ſtat. 19 *G.* II. c. 37, which gives the benefit of ſalvage to lenders on bottomry and reſpondentia, being confined to *Eaſt India* voyages, it may be proper here to enquire, whether, before that act, the lender, upon any voyage, was entitled to the benefit of ſalvage.

Whether the lender on other voyages be entitled to the ſame benefit.

By the general law of merchants, the event upon which the borrower is diſcharged, is the total loſs of the ſhip or goods upon which the money is lent; provided this happen by the perils mentioned in the contract. Though the borrower is bound to pay the ſum lent and the marine intereſt, in caſe the ſhip or goods on which the money is lent arrive at the port of deſtination, however damaged or reduced in value by the perils of the ſea; yet if part ſhould be captured or loſt, the borrower is only bound to pay in proportion to what remains (*a*).—Thus, if 1000 l. be lent on goods, the half of which are loſt, the reſt ſaved, the lender will loſe 500 l. of his principal, and the borrower will pay the remaining 500 l. with the marine intereſt upon that ſum. If the ſhip be loſt, but the goods on which the money was lent are all ſaved, the contract will remain in force, and the borrower will be liable, provided another ſhip can be procured to convey the goods to the place of their deſtination. But the charge of the other veſſel will be at the expence of the lender, and if no other can be procured, the borrower will be diſcharged on accounting to the lender for the proceeds of the goods ſaved.

(*a*) *Pothier*, h. t. n. 47; *Valin*, art. 11, 14, 17, h. t. *Emerig.* t. 2, p. 453. Conſult on this point *Bynk.* quæſt. jur. priv. lib. 3, c. 16.

But,

But, by the law of *England*, according to the opinion of Lord *Mansfield*, which we have already had occaſion to refer to (*a*), *there is neither average nor ſalvage upon bottomry contracts*; It muſt be admitted, however, that, without the benefit of ſalvage, this contract muſt partake greatly of the nature of a wager, even when the money is lent upon goods on board of equal value. If there be a total loſs of the ſhip the lender loſes all, though all the goods are ſaved.

Lord *Mansfield*'s opinion againſt it.

(*a*) Sup. 659.

As to the inſurance of bottomry and reſpondentia loans, vid. ſup. 93, 94, 95, 223, 225.

As to the remedy of the lender, where the borrower becomes bankrupt, before the riſk is ended, and the lender entitled to repayment, vid. ſup. 631.

BOOK THE THIRD.

Of Inſurance upon Lives.

CHAP. I.

Of the Nature of this Contract.

Defined.

THE inſurance of a life is a contract whereby the inſurer, in conſideration of a certain premium, either in a groſs ſum, or by annual payments, undertakes to pay the perſon for whoſe benefit the inſurance is made, a ſtipulated ſum of money, or an annuity equivalent, upon the death of the perſon whoſe life is inſured, *whenever this ſhall happen*, if the inſurance be for the whole life, or *in caſe this ſhall happen within a certain period*, if the inſurance be for a limited time.

Utility of it.

The precarious dependence of a numerous family upon the life of a ſingle perſon, naturally ſuggeſts the idea of ſeeking ſome protection againſt a calamity, which ſooner or later muſt befal them; and this, probably, ſuggeſted the firſt idea of inſurances upon lives, as an expedient by which a pecuniary indemnity, at leaſt, might be ſecured to the ſufferers, ſufficient to reſcue them from the poverty and diſtreſs with which they were threatened.

Upon this principle reſts the utility of inſurances upon lives. Perſons having incomes determinable upon their own lives, or the lives of others, ariſing from landed property, from church livings, from public employments, penſions, annuities, &c. by paying ſuch an annual premium as they can ſpare from their preſent neceſſities, may ſecure to their widows, their children, or other dependants, an adequate ſum of money, or an equivalent annuity, payable upon their deaths. By ſuch inſurances, alſo, may the fines to be paid upon the renewal of leaſes, or upon the deſcent of copyholds, be provided for. So, where

where a perſon, having only a life income, wants to borrow money, but can only give his own perſonal ſecurity for it; he may, by inſuring his life, ſecure to the lender the repayment of his money, though he ſhould die before he is enabled to diſcharge the debt (*a*).

Eſtabliſhment of the different companies for the inſurance of lives.

Theſe conſiderations induced the Biſhop of *Oxford* and ſeveral other benevolent perſons in the reign of Queen *Ann*, to apply for the charter by which the corporation, called the *Amicable Society*, was eſtabliſhed; to enable perſons to ſubſcribe a part of their incomes, in order that the repreſentative of each ſubſcriber ſhould, upon his death, receive ſuch a ſum as the funds of the corporation would enable them to pay upon the ſeveral deaths happening in each year.

Amicable Society.

But as the benefits of this ſociety were confined to a limited number of ſubſcribers, and thoſe only for ſmall ſums, ſeveral other corporations and companies upon more extenſive plans have been eſtabliſhed.—The *Royal Exchange* and *London Aſſurance* companies obtained charters from king *George* I. to enable them to make inſurances upon lives. The Society for *Equitable Aſſurances* on lives and ſurvivorſhips, was eſtabliſhed in the year 1762, by deed enrolled in the court of King's Bench at *Weſtminſter*, in which every perſon who inſures becomes a member, participating in the profit and loſs of the ſociety. The ſucceſs attending this eſtabliſhment has given riſe to two others, namely, the *Weſtminſter Society*, for inſurance on lives and ſurvivorſhips, and granting annuities; and the *Pelican* life inſurance company.

Royal Exchange and *London aſſurance companies.*

Equitable aſſurance.

Weſtminſter Society.

Pelican Company.

Legality of inſurance on lives.

We are not informed at what time this ſpecies of inſurance was firſt introduced into this country; probably becauſe it came into uſe by ſlow and imperceptible degrees. *Roccus* (*b*) has taken ſome pains to prove that inſurances upon lives are legal contracts. Yet in moſt of the ſtates of *Europe* ſuch inſurances have been prohibited by poſitive law. In this country, however, ſuch contracts have been repeatedly ſanctioned by legiſlative authority,

(*a*) Vid. inf. ch. 3.—(*b*) De aſſecur. n. 74.

and

and indeed the legality of them is now indisputable. Perhaps it is in this country alone, that insurances upon lives can be safely tolerated. In *France*, they have always been deemed illegal (*a*), and they are expressly prohibited by the ordinance of 1681 (*b*), because, say the *French* writers, it is an offence against public decency to set a price upon the life of man, particularly the life of a freeman, which is above all valuation (*c*).

(*a*) *Le Guidon*, ch. 16, art. 5.—(*b*) Tit. *des assurances*, art. 10.—(*c*) *Valin*, on art. 10. tit. *des assurances*. Vid. sup. 132; *Pothier*, tit. *des assurances*, n. 127.

CHAP.

CHAP. II.

Of the Warranty of the Health and Age of the Life insured.

IT is generally a condition or warranty in insurances upon lives, either inserted in the policy, or contained in a declaration or agreement signed by the insured, that the person whose life is meant to be insured has not any disorder which tends to the shortening of life; that he has, or has not, had the small pox; and that his age does not exceed so many years; that this declaration shall be the basis of the contract between the insurers and the insured; and that, if any untrue averment be contained therein, the contract shall be void, and all money paid on account of the insurance forfeited.

The declaration signed by the insured.

As this declaration is to be taken as part of the written contract (*a*), amounting to a warranty, it behoves every person who makes an insurance upon a life, to be very circumspect in ascertaining the truth of the allegations contained in it; because upon that the validity of the contract must depend.

By the warranty that the person, whose life is to be insured, *has no disorder which tends to the shortening of life*, is not to be understood that he is perfectly free from the seeds of all disorder. The warranty is sufficiently true if he be in a reasonably good state of health, and, that his life may be insured on the common terms, for a person of his age and condition: And the following case will shew, that though the person labours under a particular infirmity, yet, if it can be shewn that this had no tendency to shorten life, and that, in fact, it did not, in

A warranty that the party is in good health, will not be falsified by proving that he laboured under a particular infirmity; if this had no tendency to shorten life.

(*a*) See the case of *Routledge* v. *Burrell*, inf. book 4, c. 4.

any

any degree, contribute to his death, the warranty is sufficiently complied with.

The life insured is warranted in good health at the time of making the policy:—It will not falsify the warranty, to prove that, in consequence of a wound, he had a partial palsy in his loins; if this did not tend to shorten life.

Ross v. *Bradshaw*, 1 *Bl.* 312.

Thus:—An insurance was made on the life of Sir *James Ross* for one year, from *October* 1759 to *October* 1760; *warranted in good health at the time of making the policy.*—In an action on this policy, it appeared upon the trial, that Sir *James* had received a wound at the battle of *La Feldt*, in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or *fæces*, and which was not mentioned to the insurer. Sir *James* died of a *malignant fever* within the time of the insurance. All the physicians and surgeons who were examined for the plaintiff, swore that the wound had no sort of connexion with the fever; and that the want of retention was not a disorder which shortened life; but he might, notwithstanding that, have lived to the common age of man; and the surgeons who opened him said that his intestines were all sound. One physician, who was examined for the defendant said, that the want of retention was paralytic; but being asked to explain, he said it was only a local palsy, arising from the wound, but did not affect life: But, on the whole, he did not look upon him as a good life.—Lord *Mansfield*, who tried the cause, in summing up the evidence to the jury said;—"No question of fraud can exist in this case. When a man makes an insurance upon a life generally, without any warranty of the state of the life insured, the insurers take all the risk, unless some fraud be committed by the person insuring, either by *suppressing some circumstances, which he knew*, or by *alledging what was false*. But if the insured knew no more than the insurer, the latter takes the risk. Wherever there is a warranty, it must, at all events, be proved that the party was a good life, which makes the question on a warranty much larger than on fraud. Here there was a warranty, and it is proved that there was no representation at all, as to the state of life, nor any question asked about it: Nor was it necessary. Where an insurance is upon a *representation*, every material circumstance

cumſtance ſhould be mentioned; ſuch as age, way of life, &c. But where there is a warranty, then, nothing need be told; but it muſt, in general, be proved, if litigated, *that the life was, in fact, a good one: And ſo it may be, though he had a particular infirmity.* The only queſtion is, whether he was in *a reaſonable good ſtate of health, and ſuch a life as ought to be inſured on common terms.*"—The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

Nor will it falſify this warranty to ſhew that the party was troubled with ſpaſms and cramps, from violent fits of the gout.

Willis v. *Poole*, at N. P. after Eaſt. 1780.

So, where an inſurance was made on the life of Sir *Simeon Stuart*, from the 1ſt of *April* 1779, to the 1ſt of *April*, 1780, and during the life of *Eliza Edgley Ewer*. The policy contained a warranty that Sir *Simeon* was about 57 years of age, and in good health when the policy was underwritten, and that Mrs. *Ewer* was about 78 years of age. Upon the trial of the cauſe, the defendant admitted that Sir *Simeon* and Mrs. *Ewer* were of the reſpective ages mentioned in the warranty; that he died before the 1ſt of *April* 1780, and that ſhe was living. Two queſtions were intended to have been made; 1ſt. As to the plaintiff's intereſt; 2dly. On the warranty of health. The former was diſpoſed of by the plaintiff's proving a judgment debt.—As to the latter, it appeared in evidence that, though Sir *Simeon* was troubled with ſpaſms and cramps, from violent fits of the gout, he was in as good a ſtate of health when that policy was underwritten, as he had enjoyed for a long time before. It was alſo proved by the broker who effected the policy, that the underwriters were told that Sir *Simeon* was ſubject to the gout.—Doctor *Heberden*, and other gentlemen of the faculty proved that ſpaſms and convulſions were ſymptoms incident to the gout.—Lord *Mansfield*, who tried the cauſe, ſaid;—" The imperfection of language is ſuch, that we have not words for every different idea; and the real intention of the parties muſt be found out by the ſubject matter. By the preſent policy, the life is warranted, to ſome of the underwriters *in health*; to others, *in good health*; and yet there was no difference, in point of fact: *Such a warranty can never mean, that*

a man has not in him the ſeeds of ſome diſorder. We are all born with the ſeeds of mortality in us. A man, ſubject to the gout, is a life capable of being inſured (*a*), if he has no ſickneſs at the time, to make it an unequal contract."—There was a verdict for the plaintiff.

If there be no warranty, the inſurer takes the riſk upon himſelf; unleſs there be fraud. The inſured refuſes to warrant, but the broker tells the firſt underwriter, that, *from the account he had received, he believed it to be a good life.*—There being no fraud in this, the underwriters run all riſks.

When there is no warranty, the inſurer takes the riſk upon himſelf, whatever may be the ſtate of health of the perſon whoſe life is inſured, unleſs there be ſome fraudulent miſrepreſentation or concealment.

Stackpool v. *Simon*, at N. P. Hil. Vac. 1779. *Park* 437.

Thus:—An inſurance was made on the life of *Drury Sheppey*, from the 1ſt of *April* 1777, to the 1ſt of *April* 1778.—In an action on the policy, the queſtion was, as to the repreſentation of *Sheppey*'s health, at the time the policy was effected. The intereſt in the life was a debt of 900 l. due from *Sheppey* to the plaintiff. It appeared that *Sheppey*, who had a place in the cuſtom-houſe of *Ireland*, went to the ſouth of *France*, for the benefit of his health, or to avoid his creditors, and there died within the time limited in the policy. The broker, who effected the policy, told the underwriters, that the gentleman for whom he acted would not warrant any thing; but *from the account he* (the broker) *had received, he believed it to be a good life.*—Lord *Mansfield*, who tried the cauſe, ſaid;—"As to the intereſt, this policy may be conſidered as a collateral ſecurity for the debt due to the plaintiff. When there is no warranty, the underwriter runs the riſk of its being a good life or not. If there be a concealment of any knowledge of the ſtate of the life, it is a fraud. It is a rule that every ſubſequent underwriter gives credit to the repreſentation made to the firſt (*b*); and it is allowed that any ſubſequent un-

Every ſubſequent underwriter may give in evidence any repreſentation made to the firſt.

(*a*) It is now a practice, in moſt of the offices for inſurances upon lives, to require that, in the propoſal for every inſurance, it ſhall be ſtated, whether the perſon, whoſe life is to be inſured, has ever been afflicted with the gout.—(*b*) Vid. ſup. 338.

derwriter

derwriter may give in evidence a miſrepreſentation to the firſt. The broker here does not pretend to any knowledge of his own, but ſpeaks from *information* (*a*). There is no fraud in him.—The jury found a verdict for the plaintiff.

(*a*) It is not ſtated, in the above note, from what information he ſpoke; but if it had appeared that he ſpoke without any information on the ſubject, this, I conceive, would have been a miſrepreſentation that would have avoided the contract. Vid. ſup. 335.

CHAP.

CHAP. III.

Of the Intereſt of the Inſured in the Life inſured.

Neceſſity of prohibiting inſurances upon lives, without intereſt.

THE ſpirit of gaming, which is always ready to inſinuate itſelf into every tranſaction, and to aſſume the form of every contract, which depends upon uncertain events, long ſince availed itſelf of inſurance upon lives, as affording abundant opportunities for ſpeculating upon chances. Wagers came to be daily made upon the duration of men's lives, in the form of inſurances, by perſons who were neither connected with the parties, nor in any manner intereſted in the duration of their lives; nor did the inſurers much concern themſelves to know upon what intereſt, or for what reaſon, ſuch inſurances were made. Such practices were big with miſchiefs of various deſcriptions; nor is it probable that even the lives, thus preſumptuouſly inſured, were always free from danger. The evil, however, at length became apparent to the legiſlature: But it being admitted, that inſurances upon lives, under proper reſtrictions, might, in many inſtances, be highly beneficial to the public, it was determined, that ſuch inſurances ought not to be aboliſhed, but only regulated.

By 14 *G.* III., c. 48, § 1. Any inſurance made on any life, or other event, wherein the inſured ſhall have no intereſt, ſhall be void.

Therefore, by ſtat. 14 *G.* III, c. 48, § 1., it is enacted, 'That no inſurance ſhall be made by any perſon 'or perſons, bodies politic or corporate, *on the life or* 'lives of any perſon or perſons, or *on any other event or* 'events *whatever* (*a*), wherein the perſon or perſons, for 'whoſe

(*a*) The title of this ſtatute is, 'An act for regulating 'inſurances upon lives, and for prohibiting all ſuch inſurances, 'except in caſes where the perſons inſuring ſhall have an in-'tereſt

'whoſe uſe or benefit, or on whoſe account, ſuch policy or policies ſhall be made, *ſhall have no intereſt, or by way of gaming or wagering:* And that every inſurance made contrary to the true intent and meaning of this act, ſhall be null and void to all intents and purpoſes whatſoever.'

And (by § 2), it is further enacted, 'That it ſhall not be lawful to make any policy or policies on the life or lives of any perſon or perſons, or other event or events; without inſerting in ſuch policy or policies, the name or names of the perſon or perſons intereſted therein, or for what uſe, benefit, or on whoſe account, ſuch policy is ſo made or underwrote.'

And, (by § 2), the name of the perſon intereſted in the event ſhall be inſerted in the policy.

And (by § 3,) it is further enacted, 'That in all caſes, where the inſured hath an intereſt in ſuch life or lives, event or events, no greater ſum ſhall be recovered, or received from the inſurer or inſurers, than the *amount or value* of the intereſt of the inſured in ſuch life or lives, or other event or events.'

And, (by § 3), the inſured ſhall recover no more than the *amount or value* of his intereſt.

The fourth ſection contains a proviſo that this act ſhall not extend to inſurances *bonâ fide* made on ſhips or goods.

This act not to extend to marine inſurances.

Very few queſtions have ariſen upon the intereſt of the inſured, in the life inſured.—A *bonâ fide* creditor has undoubtedly an intereſt in the life of his debtor, at leaſt where he has only the perſonal ſecurity of the debtor; and it has been holden by a great authority, that this intereſt is inſurable within the ſtatute.

A creditor has an inſurable intereſt in the life of his debtor.

Thus:—An inſurance was made on the life of Lord *Newhaven*, from the 1ſt of *December* 1792, to the 1ſt of

Anderſon v. *Eaie*, at N. P. B. R. Hil. 1795; *Park* 432.

'tereſt in the life or death of the perſons inſured.'—From this title it would ſeem, that the framers of this bill originally intended to confine the operation of it to inſurances upon lives only. But the words, '*or any other event or events whatſoever*,' introduced both into the enacting parts and the preamble, plainly ſhew that the legiſlature meant, that the regulations of this act ſhould extend to every ſpecies of inſurance, except marine inſurances; to which, by the proviſo in the 4th ſection, it is declared, that it ſhall not extend.

December 1793.—In an action on the policy, the only question made by the defendant was, as to the plaintiff's interest in the life insured, which, it was contended, was not sufficient to take this case out of the above statute. It appeared in evidence, that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell*, in a large sum of money; part of which debt had been assigned by them to another person; the remainder being more than the amount of the sum insured, was, upon a settlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.—Lord *Kenyon*, who tried the cause, was of opinion, that this debt was a sufficient interest. He said it was singular that this question had never been directly decided before: That a creditor had certainly an interest in the life of his debtor; because the means by which he was to be satisfied might materially depend upon it; and that, at all events, the death must, in all cases, in some degree, lessen the security.—The jury found a verdict for the plaintiff.

Whether this ought not to be confined to the case where, by the death of the debtor, the creditor must lose his debt.

From the above note of this case, though it seems to be rather a defective one, it may reasonably be supposed that the plaintiff had only Lord *Newhaven*'s personal security for the debt, and that with him died all hopes of repayment from his estate. Upon this ground I think there could be no doubt but that the creditor had an insurable interest in Lord *Newhaven*'s life, to the amount of the debt. But Lord *Kenyon* is stated to have said, that, "*At all* "*events, the death must, in all cases, in some degree, lessen* "*the security.*"—As an abstract proposition, this is, in general, true. But it cannot be inferred from this, that his lordship meant to lay it down, as law, that every creditor, however his debt may be secured, has an insurable interest in the life of his debtor, to the amount of the debt. Lord *Mansfield*, in the case of *Stackpole* v. *Simon* (*a*), says that a policy may be considered as a col-

(*a*) Sup. 671.

lateral

lateral ſecurity for the debt due to the inſured.—And yet it would ſeem, that, even where the creditor has only the perſonal ſecurity of the debtor to rely upon for repayment, the inſurer, before he pays the ſum inſured, might, perhaps, have a right to call upon the creditor inſured, to ſhew that nothing could be recovered from the eſtate of the deceaſed debtor. Where the debt is amply and ſatisfactorily ſecured by mortgage or otherwiſe, the creditor can have but the ſhadow of an intereſt in the life of the debtor. But, by the third ſection of the above act, it is declared, that, '*No greater ſum ſhall be recovered* '*from the inſurer than the amount or value of the intereſt* '*of the inſured in the life inſured.*'—Now, what can be the *amount or value* of the intereſt of the creditor, in the caſe put?—Surely nothing that a jury could eſtimate.

The holder of a note for money won at play has not an inſurable intereſt in the life of the maker.

Be this, however, as it may, no creditor has an inſurable intereſt in the life of his debtor, unleſs the debt be incurred upon a good and legal conſideration. Therefore, in the following caſe, it was ruled, that the holder of a note given for money won at play, has not an inſurable intereſt in the life of the maker of the note.

Dwyer v. *Edie*, at N. P. after Hil. 1788. *Park* 432.

An action was brought on a policy on the life of *James Ruſſell*, from the firſt of *June* 1784 to the firſt of *June* 1785.—By a memorandum at the foot of the policy it was declared, that it was intended to cover the ſum of 5000l. due from *Ruſſell* to the plaintiff, for which he had given his note, payable in one year from the 14th of *May* 1784.—Two objections were made on the part of the defendant; 1ſt. That part of the conſideration for the note, was money won at play; 2dly. That *Ruſſell*, at the time he gave the note, was an infant.—Mr. Juſtice *Buller*, who tried the cauſe, nonſuited the plaintiff, upon the ground that part of the conſideration for the note, being for a gaming tranſaction, there was a want of intereſt in the plaintiff. But as to the objection of the infancy of *Ruſſell*, he ſaid, that the intereſt was contingent; for *Ruſſell* might or might not have avoided the note; and he doubted much whether, till ſo avoided, the note muſt not be taken, as againſt a third perſon, to be the note

The infancy of the debtor cannot be objected by an inſurer.

of a person of full age; and the maker of the note only could take the objection.

A trustee may insure for the benefit of the *cestuy que trust*.

A trustee may insure for the benefit of the *cestuy que trust*.—As where an insurance was made on the life of one *Holden*, from the 17th of *August* 1790, to the 17th of *August* 1791, and during the life of the plaintiff. *Holden* had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to this insurance, having made the plaintiff executor of his will, and directed him to make insurance. —In an action on this policy, brought by the executor, it was objected that, as the annuity was not devised to him by the grantee, he had no insurable interest in the life of *Holden* the grantor.—But Lord *Kenyon* thought this a sufficient interest in the executor to support the action.

Tilswell v. *Angerstein*, Peake 151.

CHAP. IV.

Of the Riſks which Inſurers upon Lives are to run.

AS, by the terms of this contract, the entire ſum inſured is to be paid upon the happening of one ſingle event, which cannot *partially* happen, and by the happening of which, the inſured muſt ſuffer all the injury againſt which he meant to be protected by the inſurance, the loſs muſt always be total, and never can be partial.

A loſs, upon this contract, muſt always be total.

The different inſurance companies annex to the contract certain conditions or exceptions.

What are the uſual exceptions.

The *Royal Exchange Aſſurance* declares every inſurance made by a perſon *on his own life* to be void, if the perſon, whoſe life is inſured, ſhall depart the limits of *Europe*, ſhall die upon the ſeas, or enter into any military or naval ſervice whatſoever, without the previous conſent of the company; or ſhall die by ſuicide, duelling, or the hand of juſtice.

Where the inſurance is made by a perſon, *on the life of another*, death "*by ſuicide, duelling, or the hand of juſtice*" is not excepted.

The *Weſtminſter Society* adopts the ſame exceptions. The *Equitable Aſſurance*, and the *Pelican Life-Inſurance*, adopt the ſame exceptions, only omitting the word *duelling*, even where the party inſures his own life.

We have already ſeen that, in the caſe of marine inſurances, not only the *cauſe* of the loſs, but the loſs itſelf, muſt appear to have happened during the continuance of the riſk (*a*). The ſame principle applies to inſurances

To make the inſurer liable, not merely the *cauſe* of the death, but the death itſelf muſt appear to have happened *within the time limited.*

(*a*) R. *Lockyer* v. *Offley*, 1 T. R. 252, ſup. 174, 459.

upon lives. And therefore, if a man's life be insured for a year, and some short time before the expiration of the term, he receive a mortal wound, of which he dies *after the year*, the insurer would not be liable (*a*).

But whether the death happened within the time limited, is always a question of fact. *Patterson* v. *Black*, at N. P. Hil. Vac. 1780.

But where it is uncertain whether the death happened within the time limited, this is a question of fact that must be left to the decision of a jury.

Thus:—An insurance was made on the life of *L. Macleane* Esq. from the 30th of *January* 1772 to the 30th of *January* 1778. In an action on the policy, it appeared, that, about the 28th of *November* 1777, he sailed from the *Cape of Good Hope*, in the *Swallow* sloop of war; which ship, not being afterwards heard of, was supposed to have been lost in a storm off the *Western Islands*.—The question was, whether *Macleane* died before the 30th of *January* 1778. To establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the *Cape* with *Macleane*; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of *January*, the period of a most violent storm, in which she probably was lost; and that the *Swallow* was much smaller than their vessels, which, with difficulty, weathered the storm.—Lord *Mansfield*, who tried the cause, left it to the jury to say, whether, under all the circumstances, they thought the evidence sufficient to convince them that *Macleane* died before the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict.—They found for the plaintiff.

If a policy be to take effect *from the day of the date*, the day of the date is excluded.

Sir *Robert Howard*'s case, 2 *Salk.* 625, 1 Ld. *Ray.* 480.

A question which has often puzzled lawyers, namely; whether a period of time, to commence *from the day of the date*, was inclusive or exclusive of that day, once occurred in an action upon a policy upon the life of Sir *Robert Howard*, for one year, *from the day of the date* thereof,

(*a*) Per *Willes*, J. in delivering the opinion of the court in *Lockyer* v. *Offley*, 1 T. R. 254.

which

which was the 3d day of *September* 1697. Sir *Robert* died on the 3d of *September* 1698, at one o'clock in the morning.—Lord C. J. *Holt* held that, *from the day of the date* excludes the day; but *from the date* includes it; and therefore, the day of the date being excluded in this caſe, the inſurer was held liable (*a*).

Reaſons why few litigated queſtions have ariſen in inſurances upon lives.

I have now gone through all that ſeemed to be material upon the ſubject of inſurance upon lives; from which it appears that many of the principles which govern marine inſurances are alſo applicable to this contract. Conſidering the great multiplicity of inſurances which have of late years been made upon lives, the number of litigated caſes that have ariſen upon them is extremely ſmall. One principal reaſon is, that the happening of the event inſured againſt is always a fact of eaſy proof, which can ſcarcely ever afford any ſubject of diſpute. Another is the great difficulty of practiſing any fraud in ſuch inſurances. But to no cauſe is this fortunate circumſtance more to be aſcribed than to the honour, integrity, and liberality of the ſeveral companies engaged in this branch of inſurance.

(*a*) See the caſe of *Pugh* v. the Duke of *Leeds*, *Cowp.* 714, in which, after great deliberation, it was held that the words *from the date*, and *from the day of the date*, mean the ſame thing; and that they are taken to be either incluſive, or excluſive, according to the context, and ſubject matter; and that either meaning ſhall be adopted which ſhall moſt effectually ſupport, not defeat, the intention of the parties.—This may be a very good rule, in the caſes to which it applies: But it would have been of no uſe in the deciſion of the caſe above cited; becauſe the intention of the parties, in that caſe, could only be collected from the policy; and whether they meant to include, or exclude, the day of the date, depended on the conſtruction of the words contained in it. If, therefore, ſuch a caſe were again to occur, it muſt be decided whether the day of the date ſhould be excluded or included; and then, perhaps, Lord *Holt*'s opinion might be thought the beſt authority upon that point.—Such a queſtion, however, is not again likely to ariſe; becauſe it is now the uſual practice to mention the day both of the commencement and end of the policy, and to declare both to be incluſive.

Return of premium.

As to return of premium, no question upon that subject has ever yet, as far as I have been able to learn, occurred in any case of insurance upon lives. If such a question should arise, it must be governed by the same principles which prevail upon that subject in marine insurances. These will be found under the proper head in the first book (*a*). Indeed Lord *Mansfield*, on two occasions, exemplified his doctrine, upon the subject of return of premium, by shewing their application to the case of an insurance upon a life (*b*).

Remedy against the estate of a bankrupt insurer.

With respect to the claim which the insured upon a life shall have upon the estate of the insurer, become bankrupt during the continuance of the life insured; this has been determined to be the same as in the case of marine insurances (*c*).

(*a*) See book 1, ch. 16, § 2.—(*b*) See his judgment in *Bermon* v. *Woodbridge*, sup. 573, and in *Tyrie* v. *Fletcher*, sup. 576.—(*c*) See the case of *Cox* v. *Leotard*, *Doug.* 166, n, sup. 631.

BOOK THE FOURTH.

Of Inſurance againſt Fire.

CHAP. I.

Preliminary Obſervations.

Inſurance againſt fire defined.

BY this contract the inſurer, in conſideration of a certain premium received by him, either in a groſs ſum, or by annual payments, undertakes to indemnify the inſured againſt all loſs or damage which he may ſuſtain in his houſes or other buildings, goods and merchandize, by fire, during a limited period of time.

The time of its introduction into *England* unknown.

I have not been able to aſcertain the period of the introduction of inſurance againſt fire into this country. But it has certainly been in uſe here conſiderably more than a century. Of late years, notwithſtanding a very heavy ſtamp duty impoſed on theſe inſurances, they have been brought into very general, I might almoſt have ſaid univerſal, uſe, in this country; particularly in *London* and other cities and large towns.

Very little in uſe in other countries.

I do not find, however, that this ſpecies of inſurance is much in uſe in other countries. It was not till the year 1754 that it came into uſe at *Paris*. In that year, one of the companies inſtituted there for marine inſurances, obtained from the government permiſſion to make inſurances againſt fire. But they have never, as *Pothier* informs us, become general even at *Paris* (*a*). In *Holland*, though inſurance againſt fire is not altogether unknown, few people ſeek its protection; perhaps becauſe the people of that

(*a*) Vid. *Pothier*, tit. *des aſſurances*, n. 3.

country

country, can rely so much on their own caution, that they think it unnecessary to pay for any greater security. Indeed I have heard it confidently asserted, by persons well acquainted with the cities both of *London* and *Amsterdam*, that after making all fair allowances, there is, upon an average, more property destroyed by fire in the former in one year, than in the latter in seven.

Whether in a national point of view it be more hurtful than beneficial.

The objection to it.

It cannot be denied that this species of insurance affords great comfort to individuals, and often preserves whole families from poverty and ruin. And yet it has been much doubted, by wise and intelligent persons, whether, in a general and national point of view, the benefits resulting from it are not more than counterbalanced by the mischiefs it occasions. Not to mention the carelessness and inattention which security naturally creates; every person who has any concern in any of the fire offices, or who has attended the courts of *Westminster* for any length of time, must own, that insurance has been the original cause of many fires in *London*, with all their train of mischievous consequences.

More than counterbalanced by its benefits.

On the other hand, the advocates for this species of insurance, though they admit it to have been sometimes the cause of intentional fires; yet they insist, that, even as a national concern, the benefits vastly outweigh the mischiefs which proceed from it. And when we recollect the precautions used by the different insurance companies, to prevent the spreading of fires, by providing a number of fire engines, which are kept in constant repair, and fit for immediate use, not only in all parts of the metropolis, but in every other considerable town in the kingdom;—by keeping in constant pay, a number of engineers and fire-men, expert in extinguishing fires, and porters for the removal of goods;—by employing a number of these in patrolling the streets at all hours of the night, in constant readiness to fly to the spot from whence any alarm of fire may proceed: When we recollect that the courage, promptitude, and address of these people often stop the progress of the most dangerous fires, and thereby rescue many valuable lives, and immense property

from

from deſtruction:—When theſe benefits, I ſay, are fairly conſidered, it is impoſſible to deny that they greatly outweigh all the diſadvantages that can be put in the oppoſite ſcale.

The ſeveral fire inſurance companies in *London.*

A conſiderable number of companies have been eſtabliſhed in *London* and other parts of the kingdom for inſurances againſt fire. Of theſe ſome are called *Contribution Societies*, in which every perſon inſured becomes a member or proprietor, participating in profit aud loſs. Such are the *Hand in Hand*, and the *Weſtminſter* fire-offices, for the inſurance of houſes and other buildings; and the *Union* fire-office, for inſurance of goods. The other companies inſure both houſes and goods, at their own riſk. Of theſe the principle are the *London* and *Royal Exchange* aſſurance corporations, the *Sun*, the *Phœnix*, and the *Britiſh* fire-offices.

Policies againſt fire are ſubject to a *ſtamp* of 3 s. if under 1000 l. and of 6 s. if 1000 l. or upwards.—

As to the *duties*, to which this contract is liable, the ſtat. 37 *G.* III. c. 90, § 23, repeals all the former *ſtamp duties* impoſed on policies of inſurance againſt fire; and, (by ſect. 24), impoſes on every policy, in lieu thereof, a new duty of *three ſhillings* where the ſum inſured is under 1000 l. and of *ſix ſhillings* where the ſum inſured amounts to 1000 l. or upwards.

Alſo to a *yearly* duty of 2 s. *per cent.* on the ſum inſured.

And, by the ſame act (ſect. 19), the *yearly* ſum of *ſixpence*, over and above the yearly ſum of *one ſhilling and ſixpence*, already impoſed for every 100 l. and ſo in proportion for any leſs ſum inſured, is laid on every policy for inſuring houſes, furniture, goods, wares, and merchandize, or other property, from loſs by fire.

CHAP.

CHAP. II.

Of the Intereſt of the Inſured.

Whether an inſurance againſt fire without intereſt be void at common law.

I DO not find that it has ever been a practice to make inſurances againſt fire, avowedly without intereſt. The effect of ſuch inſurance would, I think, afford a powerful argument againſt the legality of any inſurance without intereſt, at common law. If a wager inſurance be good, at common law, I do not know that it muſt neceſſarily aſſume the form of any particular ſpecies of inſurance: But if the queſtion, whether a wager policy be a legal contract at common law, were to ariſe in the caſe of an inſurance againſt fire, it is impoſſible to ſuppoſe that the judges could ever be prevailed upon to ſanction, by their authority, a contract of ſo miſchievous a tendency.—Lord Chancellor *King*, in the caſe of *Lynch* v. *Dalzell*, which we ſhall preſently have occaſion to cite at large, ſays;—"The party inſuring muſt have a property at the time of the loſs, or he can ſuſtain no loſs, and conſequently can be entitled to no ſatisfaction." And Lord *Hardwicke*, in the caſe of the *Sadler's Company* v. *Badcock* (*a*), lays it down as law, that the inſured muſt have an intereſt or property at the time of inſuring, and at the time the loſs happens. So that, according to theſe two great authorities, it is clear that an inſurance againſt fire, without intereſt, would have been void at common law. But if any doubt remained upon that queſtion, it has been removed by the ſtat. 14 *G.* III. c. 48. That act, though it is entitled, an act for regulating *inſurances upon lives*, yet, by the enacting clauſe, (ſect. 1.) (*b*), it

Since the ſtat. 14 *G.* III. c. 48, it would be clearly void.

(*a*) Inf. 700.—(*b*) Sup. 672.

pro-

prohibits all inſurances without intereſt, "*upon any event* "*or events whatſoever* (*a*);" and therefore there can be no doubt but that it extends to inſurance againſt fire; and that the inſured, whatever may be the amount of his inſurance, can only recover to the extent of his intereſt.

The inſured can only recover, in caſe of loſs, to the extent of his intereſt.

There is no doubt but that inſurances againſt fire are often made to a large amount upon property of very ſmall value. This can only be done with a fraudulent view, and a premeditated fire muſt be the neceſſary conſequence.—Where a loſs has happened, and there is no colour to ſuſpect any unfair practice on the part of the inſured, I think the offices ought not to content themſelves with being merely juſt: They ought to be generous and liberal towards a fair ſufferer. But where there is any reaſonable ground to ſuſpect fraud, it is to be hoped that the managers of no office will, from any falſe notion of generoſity, or any wiſh to acquire popular favour, ſo far forget what they owe to the public, as well as to their own characters, as to ſuffer the claim to be ſatisfied, without the moſt ſcrupulous inveſtigation.

The neceſſity of preventing inſurances againſt fire, without intereſt.

It often happens that no one office will inſure to the full amount required by a particular perſon, who has a large property to inſure; and in ſuch caſe, the party can only cover his whole intereſt, by ſeveral inſurances made at different offices. But then it is proper that each office ſhould have notice of every inſurance thus made on the ſame effects; for otherwiſe great frauds might be practiſed by inſuring the ſame property to its full value, at ſeveral different offices at the ſame time. To guard againſt ſuch frauds, there is, in the printed propoſals of each of the offices, an article which declares that, perſons inſuring muſt give notice of any other inſurance made elſewhere upon the ſame houſes or goods, that the

If there be ſeveral inſurances on the ſame property, each office muſt have notice of this.

(*a*) The 4th ſection provides that it ſhall not extend to marine inſurances, which ſhews that it was the intention of the legiſlature that it ſhould extend, according to the above words in the enacting clauſe, to every other ſpecies of inſurance.

ſame

ſame may be allowed by indorſement on the policy; in order that each office may bear its rateable proportion of any loſs that may happen (*a*). But unleſs ſuch notice be given of each inſurance to the office where another inſurance is made on the ſame effects, the inſurance made, without ſuch notice, will be void.

But a perſon may inſure without having the abſolute property.

It is not neceſſary, however, in order to conſtitute an inſurable intereſt, that the inſured ſhall, in every inſtance, have the abſolute and unqualified property of the effects inſured. A truſtee, a mortgagee, a reverſioner, a factor or agent, with the cuſtody of goods to be ſold upon commiſſion, may inſure; but with this caution, that the nature of the property be diſtinctly ſpecified (*b*); and that all the inſurances upon the ſame property, taken together, ſhall not exceed the full value thereof.

(*a*) Vid. ſup. 115.—(*b*) See the 6th article of the propoſals of the *Sun* fire-office, and 7th article of the propoſals of the *Phœnix* fire-office.

CHAP.

CHAP. III.

Of the Riſk which Inſurers engage to run.

BY the terms of the uſual policy the inſurers undertake to pay, make good, and ſatisfy to the inſured all loſs or damage, which may happen by fire, during the term ſpecified in the policy, to the houſes or other buildings, furniture, or merchandize inſured.

The riſk uſually inſured againſt.

By an article of the printed propoſals, which, as we ſhall preſently ſee (*a*), are now to be conſidered as making a part of the contract, it is provided that, "No loſs or "damage by fire, happening by any invaſion, foreign "enemy, or any military or uſurped power whatſoever, "will be made good by this company."

The proviſo, excepting fires occaſioned by extraordinary events.

In the following caſe, a queſtion aroſe upon the conſtruction of the words *uſurped power* in this proviſo.—It was an action of covenant on a policy of the *London Aſſurance* company againſt fire, upon a malting office at *Norwich*.—The defendants, amongſt other pleas, pleaded that the malting office was burnt by *an uſurped power*; and iſſue being joined on this plea, the cauſe was tried at *Norwich* aſſizes, and a verdict found for the plaintiff, damages 469 l. ſubject to the opinion of the court upon a caſe, which ſtated, 'That on the 27th of *November*, a 'mob aroſe at *Norwich*, on account of the high price of 'proviſions, and ſpoiled and deſtroyed a conſiderable 'quantity of flour: That thereupon the proclamation 'was read, and the mob diſperſed for that time. That 'afterwards another mob aroſe and burnt down the malting office mentioned in the policy.'—This caſe was twice

The words *uſurped power*, in the proviſo, mean an invaſion from abroad or an internal rebellion; not the power of a common mob.

Drinkwater v. *Lond. Aſſur.* 2 *Wilſ.* 363.

(*a*) Vid. *Oldman* v. *Bewicke*, *Routledge* v. *Burrell*, and *Wood* v. *Worſley*, inf. ch. 5.

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argued at the bar, and the court took time to deliberate. At length Lord C. J. *Wilmot*, Mr. Juſtice *Clive*, and Mr. Juſtice *Bathurſt*, againſt the opinion of Mr. Juſtice *Gould*, determined that the true import of the words *uſurped power* in the proviſo, was, an invaſion from abroad, or an internal rebellion, where armies are drawn up againſt each other; when the laws are ſilent; and when the firing of towns becomes unavoidable: But that thoſe words could not mean the power of a common mob.

The words *civil commotion*, were held to exclude loſſes in the riots of 1780.

The *London Aſſurance* company ſtill, however, retain the proviſo in its original form. The *Sun* fire-office, in the year 1727, added the words *civil commotion* (*a*); and upon the conſtruction of theſe words another queſtion aroſe in conſequence of the tumults with which the metropolis of the *Britiſh* empire was diſgraced in the ſummer of the year 1780. Theſe tumults were excited by certain perſons who, under the maſk of religion, pretended to ſeek the repeal of a law then lately paſſed, granting to *Roman* catholics, certain indulgences and ſome mitigation of the hardſhips under which they, at that time, laboured in this country; but their object was nothing leſs than the entire ſubverſion of the government. And to accompliſh this purpoſe, they excited to univerſal devaſtation, a deſperate and lawleſs rabble, made up of malefactors and fanatics, who, though actuated by different motives, are at all times equally prone to miſchief and rebellion. Fortunately for this country, the militia was at that time embodied, the rioters were repreſſed, and the conſtitution preſerved.

(*a*) Moſt of the other offices have introduced the ſame words; and ſome have the words '*riot, tumult, and civil commotion.*' It is rather remarkable, however, that neither the *Hand in Hand* or the *Union* fire offices has any proviſo or exception of this nature in their printed propoſals. It were, perhaps, to be wiſhed, that none of the offices would inſure againſt the miſchiefs occaſioned by riot and civil commotion. Men cannot be too deeply intereſted in the preſervation of the public peace, and the ſupport of lawful authority.

Amongſt

Amongſt others devoted to deſtruction by this deſperate banditti, was Mr. *Langdale*, a catholic, and a conſiderable diſtiller. His premiſes they fired; and all his ſtock of liquors and other effects were there deſtroyed.—Being inſured at the *Sun Fire Office*, he brought his action upon the policy, to recover a ſatisfaction for the loſs he had thus ſuſtained. The office defended this action on the ground that this loſs was occaſioned by *civil commotion*.—The cauſe was tried by Lord *Mansfield*, and, upon the facts of the plaintiff's caſe being proved, the point was argued very much at large by the counſel on both ſides.—Lord *Mansfield*, in his addreſs to the jury ſaid;—"Moſt undoubtedly every man's leaning muſt be to the ſide of the plaintiff, in order to divide the loſs in ſo great a calamity. But that inclination muſt be governed by the rules of law and juſtice; and the only queſtion to be determined ariſes ſingly upon the conſtruction of two words in the policy. It appears that in the year 1720, the *London Aſſurance* company put into their policies all the words here uſed, except *civil commotion*; and any fire happening by a foreign enemy is clearly provided againſt, whether they burn houſes, or ſet fire to a town. The words *military or uſurped power* are ambiguous; but they have already been the ſubject of a judicial determination (*a*). They muſt mean rebellion, conducted by authority; as in the year 1745, when the rebels came to *Derby*; and if they had ordered any part of the town, or a ſingle houſe, to be ſet on fire, that would have been by authority of a *rebellion*. That is the only diſtinction in the caſe:—It muſt be by rebellion got to ſuch a head, as to be under ſome authority. In the year 1726, the *Sun Fire Office*, in imitation of the *London* Aſſurance company, inſerted the ſame exception: This provided againſt rebellion, determined rebellion, with generals who could give orders: But the *Sun Fire Office* did not think this ſufficient; and therefore, in the year 1727, they introduced the words *civil commotion*;

Langdale v. *Muſon* and others, at N. P. Mich. Vac. 1780. MS.

(*a*) Vid. *Drinkwater* v. *Lond. Aſſur.* ſup. 687.

words as general and untechnical as can poſſibly be uſed. They do not ſay *civil commotion*, ſuch as amounts to *high treaſon*. They avoid ſaying civil commotion amounting to *felony* or to a *miſdemeanour*, but they uſe the term "civil commotion," taking the largeſt and moſt general ſenſe of the words that the language will allow: They do not even ſay a *riot*. It may be a queſtion, in point of law, whether an aſſembly or multitude be a riot. But the ſingle queſtion here is, whether this has been a civil commotion. If there be a caſe, to which theſe words can be applicable, it is to a caſe of this ſort. I cannot ſee any of the other words, to which it can be applied. Uſurped power takes in rebellion, acting under uſurped authority. From a foreign enemy the office is ſecured: But what is a civil commotion? It is ſomething elſe. The preſent was an inſurrection of the people, reſiſting all law, ſetting the authority of the government at nought; and depriving of its protection whoever was obnoxious to them. What was the object and end of this violent inſurrection? It took place in many parts of the town at the ſame time, and the very ſame night; the mob were in *Broad-ſtreet*, *St. Catherine's*, in *Coleman-ſtreet*, at *Blackfriar's Bridge*, and at the plaintiff's. What is their object? *General deſtruction, general confuſion. It certainly was meant to aim at the very vitals of the conſtitution.* It was not a private matter, under a cry of *No popery* only, to deſtroy all papiſts. *Newgate* is burnt down: The *Fleet* priſon, the *King's Bench* priſon, the new *Bridewell*, are burnt down, and all the priſoners ſet at liberty. The *Bank* attacked; the *Exciſe* and *Pay* offices in *Broad-ſtreet* threatened. The houſes of a vaſt number of papiſts burnt and deſtroyed. Military reſiſtance neceſſary, and an extraordinary ſtretch was made, which was juſtified by neceſſity. Many men have been killed. What is this but a *civil commotion*, if any preciſe meaning can be affixed to thoſe words. It is ſaid that this is a civil commotion diſtinct from uſurped power and rebellion. It is admitted, that this kind of inſurrection may amount to high treaſon: and, to be ſure, it may. But the office do not mean to

try

try whether theſe rioters were guilty of high treaſon or not. It is not put upon that, but on the ground of a civil commotion. It is not an occaſional riot: That would be another queſtion. I do not give any opinion what that might be. You will give your opinions, whether the facts of this caſe bring it within the idea of a civil commotion. I think a civil commotion is this; *an inſurrection of the people for general purpoſes*, though it may not amount to a rebellion, where there is an uſurped power. If you think it was ſuch an inſurrection of the people for the purpoſes of general miſchief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiffs. The jury found a verdict for the defendants.

But Mr. *Langdale* was not without remedy. He afterwards brought his action againſt the *Hundred*, upon the riot act, 1 *G.* I. c. 5, § 6, and recovered a full ſatisfaction for the damage he had ſuſtained.—Had the office not been exempted from this loſs by the words *civil commotion* in their propoſals, they would have had their remedy over againſt the *Hundred*. In the following caſe, which came before the court of King's Bench in the year 1782, it was determined that an inſurance company, having paid a loſs occaſioned by riots, may recover back ſuch loſs, in an action againſt the *Hundred*, on the above act, brought in the name of the inſured.

But an inſurance company who pay a loſs, occaſioned by riots, have their remedy over againſt the *Hundred*, by action upon the riot act, in the name of the inſured.

That was an action brought againſt the *Hundred* on the riot act, ſtat. 1 *G.* I. c. 5, § 6, to recover a ſatisfaction for the damage ſuſtained by the plaintiff, by the demolition of his houſe, in the riots of 1780.—Upon the trial of the cauſe, there was a verdict for the plaintiff, with 259 l. damages, ſubject to the opinion of the court on a caſe, which ſtated, in ſubſtance, that the plaintiff had inſured his houſe in the *Hand in Hand* fire office; that the fire office had paid the loſs, without any action being brought againſt them; and that this action was brought againſt the *Hundred* in the plaintiff's name, and with his conſent, for the benefit of the inſurance office, and to reimburſe them the loſs they had paid.—The queſtion was

Maſon v. *Sainſbury*, E. 22 *G* III. B. R.—MS.

whether, as the plaintiff had already received a ſatisfaction, this action could now be maintained againſt the Hundred on behalf of the inſurers.—It was contended, on the part of the Hundred, that it was the policy of the act, beſide the inducement to ſuppreſs riots, to divide the loſs, and prevent the ruin of individuals; but there could be no reaſon of policy or juſtice to extend this, beyond the party himſelf, to bodies or individuals, who have wilfully put themſelves into this danger: That though it was true that a man, having different remedies may purſue either, and it is no defence to the one, that he might have purſued other; yet, when he has recovered by one, he ſhall not afterwards ſeek a ſecond ſatisfaction by the other.—But the court were unanimouſly of opinion that the office had a right in this caſe, to recover againſt the Hundred, in the name of the inſured.—Lord *Mansfield*, ſaid;—"Though the office paid without a ſuit, this muſt be conſidered as without prejudice; and it is, to all intents, as if it had never been paid. The queſtion comes to this: Can the owner of the houſe, having inſured it, come againſt the Hundred, under this act? Who is firſt liable? If the Hundred be firſt liable, ſtill it makes no difference: If the inſurers be firſt liable, then payment by them is a ſatisfaction, and the Hundred is not liable. But the contrary is evident, from the nature of the contract of inſurance. It is an *indemnity*. We every day ſee the inſured put in the place of the inſurer. In abandonment it is ſo; and the inſurer uſes the name of the inſured. It is an extremely clear caſe. The act puts the Hundred in the place of the treſpaſſers; and on principles of policy, I am ſatisfied that it is to be conſidered as if the inſurers had not paid a farthing."—Mr. Juſtice *Willes* ſaid;—"I cannot diſtinguiſh this from the caſe of an eſcape. If the ſheriff pays, he has his remedy over againſt the party. Though the Hundred is not anſwerable criminally, yet they are not to be conſidered as wholly free from blame. They may have been negligent, which is partly the principle of the act." Mr. Juſtice *Aſhurſt* ſaid;—"At all events the plaintiff is entitled to a verdict to the amount of the premium, having

having had no compenſation as to that. But, on the larger ground, I am of opinion that the Hundred is liable in this action for all the damage ſuſtained by the plaintiff. It is like the caſe of an abandonment, and the office is not to be in a worſe ſituation for having paid the loſs without a ſuit."—Mr. Juſtice *Buller* ſaid;—"Whether this caſe be conſidered on ſtrict, or on liberal, principles of inſurance law, the plaintiff muſt recover. Strictly, no notice can be taken of any thing out of the record. The contract with the office, ſtrictly taken, is a wager; liberally, it is an indemnity: But, on the words, it is only a wager, of which third perſons ſhall not avail themſelves. It has been rightly admitted that the Hundred is put in the place of the treſpaſſers. How could the treſpaſſers have availed themſelves of this ſatisfaction made by the Office? Could they have pleaded it by way of *accord and ſatisfaction*. It was not paid as a ſatisfaction for the treſpaſs, and the facts of the caſe would not have ſupported ſuch a plea. The beſt way is to conſider this caſe as a contract of indemnity, in which the principle is, that the inſurer and the inſured are as one perſon; and in that light, the paying before or after, can make no difference."

How far the inſured is protected by the policy during the 15 days allowed for paying the renewed premium.

In general the riſk commences from the ſigning of the policy, unleſs ſome other time be ſpecified; and it will of courſe end with the term for which it is made. Inſurances againſt fire are, in general, either annual, or for a term of ſeven years, at an annual premium; and the offices, as an indulgence to the inſured, generally allow 15 days from the expiration of each year for the payment of the premium for the next ſucceeding year. But the inſured has always been conſidered as being under the protection of the policy till the expiration of the 15 days, provided the premium were paid within that time.

How far in the caſe of a half-yearly policy.

In the printed propoſals of the *Sun Fire Office*, and of ſome others, there is this article:—'On beſpeaking 'policies, all perſons are to make a depoſit for the po'licy, ſtamp duty, and mark; and ſhall pay the pre-

'mium to the next quarter-day, and from thence for one 'year more at leaſt; and ſhall, as long as the managers 'agree to accept the ſame, make all future payments 'annually at the ſaid office, within 15 days after the 'day limited by their reſpective policies, upon forfeiture 'of the benefit thereof; and no inſurance is to take place 'till the premium be actually paid by the inſured, his, her, 'or their agent or agents.'—In the following caſe it became a queſtion how far the inſured, upon a half-yearly policy, was protected during the 15 days, before the new premium was actually paid and accepted.

The inſured in a policy agrees to pay the premium half-yearly, within 15 days of the expiration of the former half year. A loſs happens within the 15 days, but before the renewed premium is paid. —The inſurers are not liable, though the premium was tendered before the end of the 15 days.

Tarleton and others v. *Staniforth* and others. 5 T. R. 695.

It was an action againſt the *Liverpool* fire-office, which had adopted the above article. The plaintiff declared on a policy dated the 10th of *December* 1788, in which, (after reciting that the plaintiffs had paid 7l. 10s. to the office, and had agreed to pay 7l. 10s. on the 10th of *June* 1789, and the like ſum every ſix months during the continuance of the policy), it was declared that, from the date of the policy, ſo long as the plaintiffs ſhould pay the ſum of 7l. 10s. at the times and places aforeſaid, and the truſtees or acting members of the ſociety ſhould agree to accept the ſame, the funds of the ſociety ſhould be liable to pay the plaintiffs ſuch damage and loſs as they ſhould ſuffer by fire, not exceeding 6000l. according to the exact tenor of their printed propoſals.—The declaration, after ſetting forth the above article of the printed propoſals, ſtated that the ſociety had, from the year 1777, been in the practice of inſuring for periods leſs than a year, by policies ſimilar to the preſent, referring, in like manner, to the ſame printed propoſals; and that they had received the premiums within the 15 days after the times limited in ſuch policies, and the policies thereupon remained in force. It then ſtated a loſs, to the amount of 6000l. on the 11th of *December* 1789, before the expiration of the 15 days, and before any refuſal to accept the renewed premium, or to continue the policy. There was a ſecond count, ſtating that, before the expiration of the 15 days, the plaintiffs tendered at the office 7l. 10s. to the managers of the

ſociety

ſociety, they not having then diſagreed or refuſed to accept the ſame.—The defendants, amongſt other pleas to the firſt count, pleaded that the plaintiffs did not pay the ſum of 7 l. 10 s. on or before the 10th of *December*, as they ought to have done, in order to have continued the policy to the time when the loſs happened. To the ſecond count they pleaded, that the ſum of 7 l. 10 s. was not tendered to the managers, until after the 10th of *December*.—Upon a demurrer to theſe pleas, the court determined that, under the above circumſtances, the plaintiffs were not entitled to recover, and gave judgment for the defendants.—Lord *Kenyon* ſaid;—"It is admitted that the inſurance did not extend to half a year and 15 days; and that completely puts an end to the whole caſe. The plaintiffs ſtipulated to pay 7 l. 10 s. half yearly, on the 10th of *June*, and the 10th of *December*; and that they would, *as long as the managers agreed to accept the ſame*, make their payments within 15 days after the day limited; *but no inſurance is to take place until the premium be actually paid.* The continuation of the term, therefore, depends on two circumſtances which muſt both concur; namely, that the inſured ſhould pay the 7 l. 10 s. and that the inſurers ſhould agree to accept that ſum. Barely ſtating theſe facts is ſufficient to ſhew that the plaintiffs are not entitled to recover.

Soon after the above deciſion, the *Royal Exchange*, the *Phœnix*, and ſome other inſurance companies gave notice that they did not mean to take advantage of this judgment; but would hold themſelves liable for any loſs during the 15 days that are allowed for the payment of the renewed premium upon annual policies, and others for a longer period: But that every policy for a ſhorter period than a year, would ceaſe at ſix o'clock in the evening of the day mentioned therein.

But ſeveral offices hold themſelves liable during the 15 days on annual policies.

CHAP.

CHAP. IV.

Of the Aſſignment of the Policy.

An aſſignment of the policy to one who has no intereſt in the effects inſured, is void.

A POLICY of inſurance, being a *choſe in action*, is, in ſtrictneſs, not aſſignable at law. But, like every other choſe in action, it may be aſſigned in equity; and courts of law now take notice of ſuch aſſignment; ſo that the ancient rule of the common law, being often found injurious to the intereſts of a commercial country, is now, in a manner, diſregarded, or at leaſt evaded. But the mere aſſignment of the policy, would be of little avail, without an aſſignment of the ſubject-matter of the inſurance alſo. The aſſignee could derive no benefit from the policy, unleſs the intereſt of the inſured were transferred with it; becauſe, as we have already ſhewn, the inſured muſt not only have an intereſt in the ſubject matter of the inſurance, at the time of inſuring, but alſo at the time the loſs happens (*a*).

Upon the death of the inſured, the policy is continued to his repreſentative.

In the printed propoſals of all the offices it is declared that, upon the death of an inſured, his intereſt in the policy ſhall be continued to his repreſentative, to whom the property inſured belongs, provided ſuch repreſentative, before any new payment be made, procure his right to be indorſed on the policy at the office.

The contribution ſocieties ſeem to allow the aſſignment of their policies without any expreſs permiſſion.

In the propoſals of the *Hand in Hand* fire office, it is declared, that if the premiſes inſured ſhould be aſſigned, the aſſignment muſt be entered at the office; and that aſſignments of policies ſhall be entered at the office, within 42 days after they are executed; or elſe the aſſignee ſhall have no benefit thereby. And in the pro-

(*a*) Per Lord *King*, Ch. in *Lynch* v. *Dalzell*, inf. 698; Per Lord *Hardwicke* Ch. in the *Sadlers Company* v. *Badcock*, inf. 700; vid. ſup. 684.

poſals

poſals of the *Union* fire office, it is declared, that every member transferring his policy, ſhall, within three months, give notice to the directors, and bring their policies to the office, to have ſuch transfer indorſed.

The *Weſtminſter* office merely deſires that the aſſignment ſhall be entered at the office as ſoon as poſſible. So that, it would ſeem, the policies of theſe three *contribution ſocieties* may be aſſigned, without any expreſs permiſſion from the reſpective offices for that purpoſe; and that it is ſufficient if the aſſignment be brought to the reſpective offices to be entered.

But the other offices allow of no aſſignment, without their expreſs permiſſion.

But the other offices give notice, generally upon the policy, that it ſhall be of no force if aſſigned, unleſs ſuch aſſignment be allowed by an entry in the books of the office, or indorſed on the policy. So that it ſeems to be a ſettled rule in all the offices, not to allow any transfer of any policy, without the conſent of the managers. This is perfectly reaſonable. The offices may chuſe for whom they will inſure; they are not obliged to inſure for every perſon that may apply to them. In ſome inſtances, character may be a ſufficient reaſon for a refuſal. But the offices would be deprived of this option, if any perſon inſured might aſſign his policy to whom he pleaſed, without their concurrence. This will appear from the following caſe.

The inſured upon a houſe and goods aſſigns the houſe to *A.* and the goods to *B.*; *B* aſſigns the goods over to *A.* to ſecure to *A.* the money advanced for *B.* to purchaſe them. Afterwards a fire happens, and the inſured aſſigns the policy to *A*; and *B.* alſo aſſigns to him his intereſt in the policy. Theſe aſſignments of the policy being made after the fire happened, and without the

On the 28th of *July* 1721, one *Richard Ireland* obtained a policy from the *Sun* fire-office for the inſurance of his houſe, being the *Angel* inn at *Graveſend*, with his goods therein, from loſs and damage by fire: And it was agreed, that ſo long as *Ireland* ſhould pay five ſhillings a quarter, the ſociety would ſatisfy the ſaid *Ireland*, his executors, adminiſtrators, and aſſigns, his loſs not exceeding 1000 l. according to the exact tenor of their printed propoſals.—Some conſiderable time afterwards, *Ireland* died, leaving his ſon *Anthony* his ſole executor: who brought the policy to the office, and had an indorſement made thereon, that the ſame belonged to him; and he afterwards paid one year's premium up to *Chriſtmas* 1727. In *Auguſt* 1727, the houſe was deſtroyed by fire; and ſome time afterwards, the plaintiffs

conſent of the office, the aſſignee cannot recover the loſs under it.

Lynch and another v. *Dalzell* and others, 3 *Bro.* Parl. Ca. 497.

tiffs applied to the office, and alledged that they had purchaſed the houſe and goods of *Anthony Ireland*; that the ſame were their property at the time of the fire; and that they had an aſſignment of the policy made to them, at the ſame time that the houſe and goods were aſſigned; and they produced an affidavit from *Roger Lynch*, in which he ſwore that their loſs, by the burning of the houſe, amounted to 500 l. and upwards; and upon this affidavit was indorſed the uſual certificate from the miniſter and churchwardens, &c.: But neither in the affidavit or certificate, was any mention made of any loſs being ſuſtained by the plaintiffs by the burning of any goods; nor was any affidavit made by *Anthony Ireland*, that he had ſuffered any loſs.—The plaintiffs, however, inſiſted that the office ſhould pay them 1000 l. for their loſs by the burning of the houſe and goods; and they filed a bill in chancery, ſetting forth, that *Anthony Ireland*, on the 24th of *June* 1727, for 250 l., aſſigned to them a leaſe of the houſe and ſtables; but, that the goods, for which the plaintiffs, as they alledged, were to pay 500 l., being intended for one *Thomas Church*, who was to hold the inn under them, *Ireland*, by bill of ſale of the ſame date, ſold the ſame to *Church* for his own uſe. The bill alſo ſtated the aſſignment of the policy to the plaintiffs; and that, although the bill of ſale of the goods was made to *Church*; yet that the plaintiffs paid the purchaſe money, and *Church* aſſigned the bill of ſale to them for ſecuring it; and alſo releaſed to the plaintiffs his intereſt in the policy.—The defendants, by their anſwer, alledged that the affidavit produced was not agreeable to the propoſals; that no aſſignment of the policy was made to the plaintiffs, nor any aſſignment of it made to them by *Church*, till after the fire. They inſiſted that the policies iſſued by the office were not, in their nature, aſſignable, being only contracts to make good the loſs which the contracting party *himſelf* ſhould ſuſtain; and that no other perſon was entitled to any benefit from it. The cauſe proceeded to iſſue; and witneſſes being examined on both ſides, it appeared upon the plaintiff's own evidence, that the agreement for the aſſignment of

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the policy, (if any), was not till after the agreement for the purchaſe of *Ireland*'s term in the houſe; and that the aſſignment of it, though bearing date *before*, was not made till ſome time *after* the fire: So that the agreement for aſſigning the policy was a voluntary conceſſion on the part of *Ireland*, and independent of the bargain for the houſe, and not made till after *Ireland*'s intereſt in the houſe was determined; nor carried into execution till after the loſs had happened. And as to the plaintiff's property in the goods, they proved an aſſignment from *Church* to them, as a ſecurity for 300 l; but omitted to ſtate *when* this aſſignment was made, though the defendants, by their anſwer, had put the time in iſſue.—Upon this caſe, the Lord Chancellor *King* diſmiſſed the plaintiff's bill.—He ſaid;—" Theſe policies are not inſurances of the ſpecific things mentioned to be inſured; nor do ſuch inſurances attach on the realty, or in any manner go with the ſame, as incident thereto, by any conveyance or aſſignment: But they are only ſpecial agreements with the perſons inſured, againſt ſuch loſs or damage as they may ſuſtain. *The party inſured muſt have a property at the time of the loſs, or he can ſuſtain no loſs: and conſequently can be entitled to no ſatisfaction.* There was no contract ever made between the office and the plaintiffs for any inſurance on the premiſes in queſtion. Not only the expreſs words, but the end and deſign of the contract with *Ireland*, do, in caſe of any loſs, limit and reſtrain the ſatisfaction to ſuch loſs as ſhould be ſuſtained by *Richard Ireland* only; and the indorſement on the policy transferred that right to his executor *Anthony Ireland* only. Theſe policies are not in their nature aſſignable; nor is the intereſt in them ever intended to be tranſferable from one to another, without the expreſs conſent of the office. The tranſactions in the preſent caſe, by changing the property backwards and forwards, and rendering it uncertain whoſe the true property really was, raiſe a ſuſpicion, and fully juſtify the caution of the office in preventing the aſſignment, without the conſent of the managers; which method is purſued by all the inſurance offices. Beſides, the plaintiff's claim

The policy does not paſs with the effects inſured.

The policy is only aſſignable with the conſent of the office.

claim is, at beſt, founded only on an aſſignment never agreed for, till the perſon inſured had determined his intereſt in the policy, by parting with his whole property, and never executed till the loſs had actually happened." —Upon appeal to the Houſe of Lords, the decree of the Court of Chancery was affirmed.

A leſſee having an unexpired term of ſix years and an half in a houſe, inſures for ſeven years. After the term expired the houſe is burnt, and afterwards, but before the expiration of the policy, the inſured aſſigns it to the reverſioner, without the concurrence of the office.—The aſſignee cannot claim any benefit under the policy.

The Sadler's Company v. *Badcock* and others, 2 *Atk.* 554.

The ſame principles were adopted in another caſe, where one *Anne Strode*, having ſix years and a half to come in a leaſe of a houſe from the plaintiffs, on the 27th of *April* 1734, inſured the houſe for 400 l. in the *Hand in Hand* fire office, for ſeven years, and thereby became a proprietor; and, on paying twelve ſhillings down, and 3 l. ſome time after, the company agreed, out of their contribution ſtock, 'to *pay the ſaid ſum of* 400 *l.* 'to *her, her executors and aſſignees, ſo often as the houſe* 'ſhould *be burnt down during the ſaid term, unleſs the di-* 'rectors *ſhould rebuild the ſame*;' and on the back of the policy it was indorſed, 'that *if the policy ſhould be aſſigned,* 'the *aſſignment muſt be entered within* 21 *days after the* 'making *thereof.*'—Mrs. *Strode*'s leaſe expired at *Midſummer* 1740; the houſe was burnt down in *January* 1741; and ſhe aſſigned the policy to the plaintiffs on the 23d of *February* 1741. The plaintiffs tendered the aſſignment to the defendants to be entered in their books, but they refuſed to accept it. The company, in 1738, which was ſubſequent to Mrs. *Strode*'s policy, made an order, 'That 'whereas policies expire upon the property of the in-'ſured's ceaſing; if there is no application of the in-'ſured to aſſign, or to have the loſs made up, then 'the perſon having the property, may inſure the ſaid 'houſe in the ſaid office, notwithſtanding the term 'for which the ſaid houſe was originally inſured is 'not expired.' The queſtion upon this cauſe was, whether the plaintiffs, the aſſignees of Mrs. *Strode*, were entitled to the benefit of the policy.—The court determined that they were not entitled to any benefit under it.—The Lord Chancellor *Hardwicke* ſaid;—"During the progreſs of this cauſe, while the defendants ſeemed to depend chiefly upon the ſubſequent order,

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I was of opinion againſt them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three queſtions made in this cauſe. *Firſt*, whether this accident, which has happened, be ſuch a loſs, as obliges the defendants to make ſatisfaction to the plaintiffs. *Secondly*, whether upon the terms of the original policy, the office be obliged to do it. *Thirdly*, which is rather conſequential of the former, whether the plaintiffs are properly aſſignees of Mrs. *Strode*, under this policy. If this matter reſted ſingly upon the policy itſelf, I ſhould not think it ſuch a loſs, as would oblige the defendants to make ſatisfaction. Under this policy, the ſtate of the caſe is, Mrs. *Strode* was only a leſſee; her time expired at *Midſummer* 1740; the houſe was burnt down in *January* after, *within the ſeven years*; the plaintiffs, the *Sadler's Company*, were ground landlords, and entitled to the reverſion of the term: Upon the 23d of *February*, ſeven months after the expiration of the term, and one month after the fire, the aſſignment was made, and in conſideration of five ſhillings only; ſo that it muſt be taken as a voluntary aſſignment, as it ſtands before me. It has been inſiſted, on the part of the defendants, that the plaintiffs are not entitled to recover, as ſtanding in the place of Mrs. *Strode*, becauſe ſhe had no loſs or damage, her intereſt ceaſing before the fire happened. And this introduces the ſecond and third queſtions. I am of opinion, that it is neceſſary the party inſured ſhould have an intereſt or property at the time of inſuring, and at the time the fire happens. It has been ſaid for the plaintiffs, that it is in nature of a wager laid by the inſurance company, and that it does not ſignify to whom they pay, if loſt. Now theſe inſurances from fire have been introduced in later times, and therefore differ from inſurance of ſhips, becauſe there, *intereſt or no intereſt* is almoſt conſtantly inſerted; and if not inſerted, you cannot recover, unleſs you prove a property. By the firſt clauſe in the deed of contribution in 1696, the year this ſociety, called the *Hand in Hand Office*, incorporated themſelves, the ſociety

are to make ſatisfaction in caſe of any loſs by fire. To whom, or for what loſs, are they to make ſatisfaction? Why to the perſon inſured, and for the loſs he may have ſuſtained; for it cannot properly be called inſuring *the thing*, for there is no poſſibility of doing it, and therefore, muſt mean inſuring *the perſon* from damage. By the terms of the policy, the defendants might begin to build and repair within ſix days after the fire happens. It has been truly ſaid, this gives the ſociety an option to pay or rebuild, and ſhews moſt manifeſtly that they meant to inſure upon the property of the inſured, becauſe nobody elſe can give them leave to lay even a brick; for another perſon might fancy a houſe of a different kind. Thus it ſtands upon the original agreement. The next queſtion will be, whether the ſubſequent order made by the defendants in 1738, has made any alteration. I am of opinion that it has not; for it was made only to explain a particular caſe in the policy, for it might have been a queſtion, whether Mrs. *Strode* could have come before the expiration of the term, to examine the books of the office, and therefore this order was made to give her ſuch a power. It has been ſtrongly objected that the ſociety could not make ſuch an order. I am very tender of ſaying, whether they can or not. Becauſe, on the one hand, it might be hard to ſay, that, as a ſociety, they cannot make any order for the good of the ſociety: On the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the intereſt of the inſured. The aſſignment is not at all within the terms of this order, becauſe it is plain, it meant an aſſigment before the loſs happened. Now with regard to the loſs happening before the aſſignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the depoſit. It is plain ſhe thought ſo, for if ſhe had imagined ſhe had been entitled to 400 *l.* would any friend have adviſed her to make a preſent of it to the plaintiff? The caſe of *Lynch* v. *Dalzell*, in the Houſe of Lords, ſhews how ſtrict this court and that houſe are, on the conſtruction of policies, to avoid frauds."

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The foregoing determinations ſhew that, upon an aſſignment or other transfer of the property inſured, the aſſignee ſhould be very careful to get the policy regularly transferred to him, by the proper indorſement at the office. And in a former part of this work, *(a)* it was ſhewn that if the aſſignor undertake to get this done, he will be liable to the aſſignee for all the conſequences of neglecting or omitting to do ſo; even though his undertaking was merely gratuitous.

If an aſſignor of the property inſured undertake to get the policy transferred to the aſſignee, he will be liable to an action for neglecting to do ſo.

(*a*) Vid. *Wilkinſon* v. *Coverdale*, ſup. 207.

CHAP.

CHAP. V.

Of the Proof of Loſs.

Of the account of the loſs, the affidavits of the inſured, and the certificate from the miniſter, &c. required by the printed propoſals.

THE form of the policy is nearly the ſame in all the offices (*a*). The principal difference between them conſiſts in the terms of certain *propoſals*, as they are called, to which it refers, as making a part of the contract. One principal article, which is found in the propoſals of ſeveral of the offices (*b*) imports,—'That perſons inſured ſuſtaining any loſs or damage by fire are forthwith to give notice thereof at the office, and, as ſoon as poſſible afterwards, deliver in as particular an account of their loſs and damage, as the nature of the caſe will admit of; and make proof of the ſame by their oath or affirmation, according to the form practiſed in the ſaid office; and by their books of accounts, or other proper vouchers, as ſhall be reaſonably required; and procure a certificate under the hands of the miniſter and churchwardens, together with ſome other reputable inhabitants of the pariſh, not concerned in ſuch loſs, importing,—That they are well acquainted with the character and circumſtances of the perſon or perſons inſured, and do know or verily believe, that he, ſhe, or they, really and by misfortune, without any fraud or evil practice, have ſuſtained by ſuch fire, the loſs and damage, as his, her, or their loſs, to the value therein-mentioned: But, till ſuch affidavit and certificate of ſuch inſured's loſs ſhall be made and produced, the loſs money ſhall not be payable. And, if there appear any fraud or falſe ſwearing, ſuch ſufferers ſhall be excluded all be-

(*a*) Vid. Append. N°. VII.—(*b*) The *Royal Exchange*, the *Sun*, and the *Phœnix* fire offices.

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nefit by their policies. In the policies of theſe offices the inſurers undertake to pay the loſs, not exceeding the ſum inſured, '*according to the exact tenor of their printed proposals*,' deſcribing their propoſals by their reſpective dates.

The above article, though not worded in the beſt poſſible manner, has undoubtedly a very beneficial tendency. Nothing can be more reaſonable in a caſe where there is ſo great a temptation to fraud, than to require a teſtimonial from perſons in public ſituations in the pariſh where a fire has happened, who have opportunities of informing themſelves as to the characters of the inſured, and the fairneſs of their claims; and who are not likely to connive at any fraud. "It is a duty," ſays Mr. Juſtice *Lawrence* (*a*), "that the office owes to the public as well as to themſelves, to take every precaution to protect themſelves againſt fraud. And unleſs ſome ſuch check as the preſent were interpoſed, the office would be holding out a premium to wicked men to ſet fire to their own houſes."—Perhaps it may, ſome time or other, be thought adviſable for all the inſurance companies to agree among themſelves to have this article reviſed, and put into a more unexceptionable form, and to adopt it univerſally. The conſtruction of this article has given occaſion to ſeveral judicial deciſions.

The reaſonableneſs of requiring this proof.

The firſt was an action againſt the directors of the *Sun Fire-Office*, upon one of their policies. The plaintiffs, in their declaration, after ſtating that the bankrupt, the inſured, had conformed to the above article, as to the notice, account, and affidavit of the loſs; ſtated that the miniſter of the pariſh of *Portſea*, in which the loſs had happened, reſided at a diſtance from the pariſh, and was wholly unacquainted with the character and circumſtances of the inſured, and unable to make the certificate required by the policy; but that the inſured had procured and delivered to the office a certificate under the hands of ſeveral reputable inhabitants of

To excuſe the want of the certificate, it is not enough to allege that the miniſter reſides out of the pariſh, and does not know the inſured. And the want of this certificate is a defect of title, for which the court will arreſt the judgment, after the plaintiff has obtained a verdict on the queſtion of

(*a*) 6 T. R. 722.

fraud, and want of intereſt.

Oldman and others, aſſignees of *Ingram*, v. *Bewicke* and others, in C. B. Mich. 26 *G.* III. 2. H. *Bl.* 577, n.

the tenor required by the article. The defendants pleaded 1ſt, That the premiſes were wilfully ſet on fire, and burnt down by the inſured. 2dly, That at the time of the ſuppoſed loſs the inſured had no intereſt in the premiſes. No notice was taken in any of the pleas, of the want of the certificate.—Iſſues being joined on the above pleas, the cauſe went to trial, and the jury found a verdict for the plaintiffs, damages 300 l.—The demand was 1500 l. the ſum inſured.—The defendant moved in arreſt of judgment, on the ground that the plaintiffs had not ſet forth in their declaration a ſufficient title to recover upon the policy againſt the defendants.—In anſwer to this application, it was ſaid that it was grounded either on the title being defective, or defectively ſet forth: That the latter objection was cured by the verdict, and the former varied by the defence ſet up by the pleas.—The court, however, arreſted the judgment.—Lord *Loughborough* ſaid,—"Though I am ſatisfied the verdict was right, that the fire was accidental, and that the certificate could not have been procured, becauſe the inſured had not ſuſtained all the loſs he claimed; yet the rule of intendment after verdict cannot be applied where there is an abſolute defect of title, as there is in this caſe. As to the pleas, they are wholly collateral to the title."—Mr. Juſtice *Gould* ſaid,—"Till the affidavit is made, and the certificate procured, the money is not payable: The time of payment, therefore, is not yet come. Though a perſon were a *bonâ fide* ſufferer, ſtill he is not entitled without a certificate. The ſtipulation is a condition precedent, that there ſhall be a certificate to ſhew that there is no kind of fraud. Nothing is ſaid about the churchwardens; and the excuſe of the miniſter living at a diſtance is frivolous."

The article of the printed propoſals requiring the certificate, though without ſtamp, ſeal, or ſignature, and though only referred to in the

The next caſe upon this ſubject was an action of covenant brought by the executrix of the inſured on a policy of the *Sun Fire-Office*.—The declaration, by way of excuſe for not producing the certificate required by the above article, ſtated that the teſtator, the inſured, after the loſs, being entitled to ſuch certificate, applied to

miniſter and churchwardens, and to many reputable inhabitants to procure ſuch certificate; but that the defendants, by falſe inſinuations, and promiſes of indemnity, prevailed on the miniſter, &c. to refuſe to ſign it. —The defendants, as to the firſt breach of covenant, pleaded, 1ſt, That the inſured had no intereſt in the goods, &c. inſured; and 2dly, That they did not prevail on the miniſter, &c. to refuſe to ſign the certificate. —And as to the ſecond breach, they pleaded, 1ſt, No intereſt; and 2dly, That neither the teſtator in his life time, nor the plaintiff ſince his death, had procured ſuch certificate.—Iſſue was joined upon the three firſt pleas, and the plaintiff demurred to the laſt.—In arguing that demurrer, it was contended on the part of the plaintiff, 1ſt, That a condition or reſtriction could not be annexed to, and made part of a deed, by words of mere reference to a printed paper, diſtinguiſhed only by the date of the year in which it was printed, without any ſignature, ſeal, or ſtamp, to give it authenticity; and 2dly, That the reſtriction in queſtion, though it were properly annexed to the deed, was bad in itſelf. Many authorities were cited in ſupport of theſe propoſitions:—But the court ſaid that the matter was too clear to admit of a doubt, and gave judgment for the defendants.

policy, is part of the contract, and is binding on the inſured.

Routledge Executrix v. *Burrell*, Bart. and another, 1 H. *Bl.* 254.

At length, in the following caſe, it has been fully ſettled, after ſolemn argument, and upon full deliberation, that the printed propoſals are to be taken as part of the policy; that the procuring of the certificate from the miniſter and churchwardens, &c. is a condition precedent to the payment of the loſs; and that the inſured has no title to demand any loſs, without this certificate, though he ſhould be able to ſhew that the miniſter and churchwardens had wrongfully refuſed to ſign one.

It is now ſettled that the procuring the certificate is a condition precedent to the payment of any loſs; and that its being wrongfully refuſed will not excuſe the want of it.

That was an action brought by the aſſignees of the inſured, who had become bankrupts, againſt the *Phœnix* inſurance company. The plaintiffs in their declaration, after ſtating the loſs, and notice to the office, alledged that the bankrupts, ſoon after the loſs, procured and delivered to the company a certificate under the hands

Wood and others aſſignees of *Lockyer* and *Bream* v. *Worſley*. 2 H. *Bl.* 574, 6 T. R. 710.

of divers reputable householders in the parish, in the usual form; and that, '*as soon as possible after the loss, they applied to, and requested, the minister and churchwardens of the parish to sign such certificate*; *but that the said minister and churchwardens, without any reasonable or probable cause whatsoever, did wrongfully and unjustly refuse to sign any such certificate as aforesaid.*' There was another similar count, only omitting the request to the minister and churchwardens to sign the certificate, and their refusal.—To the first count, the defendant pleaded; 1st, Want of interest in the bankrupts; 2dly, That the loss happened by fraud; and 3dly, That the minister and churchwardens did not wrongfully, and without probable cause, refuse to sign the certificate.—To the second count the defendant pleaded similar pleas, as to want of interest and fraud; and 3dly, That neither the bankrupts nor the plaintiffs had procured any certificate from the minister, churchwardens, and reputable inhabitants, as is required by the said printed proposals.—By the replication issue was joined on the first five pleas; and, as to the last plea, the plaintiffs assigned the same excuse for the want of the certificate from the minister, &c. as in the first count of the declaration; and this having proceeded to issue, the cause was tried and the plaintiffs obtained a verdict for 3000 l.—The defendant moved in arrest of judgment on the same ground, as in the case of *Oldman* v. *Bewicke* (*a*), namely, that the production of the certificate was a condition precedent to the payment of loss, and that the plaintiffs, not having averred performance, had shewn no title to recover.—After the argument, Lord C. J. *Eyre*, Mr. Justice *Buller*, and Mr. Justice *Rooke*, seemed to be of opinion that, supposing the printed proposals to be conditions precedent, there had been a performance *cy prez*; but that, in truth, the policy being a commercial contract, was to be construed liberally, and the true question was, whether the loss had been fairly incurred. If it had, and it appeared on the record to have so happened, the refusal of the

(*a*) Sup. 703.

minister

miniſter and churchwardens was without cauſe, and therefore the plaintiffs were entitled to maintain their action. But Mr. Juſtice *Heath* appeared to differ from the reſt of the court, and time was taken to deliberate.—Afterwards, judgment was given for the plaintiffs, *pro formâ*, as it was underſtood that a writ of error would be brought, whichever way the judgment ſhould be given.—Upon this writ of error, the court of King's Bench, after two arguments, reverſed the judgment of the court of Common Pleas, being unanimouſly of opinion that the production of the certificate was a condition precedent.—Lord *Kenyon* ſaid he did not ſee how the term *cy pres* was applicable to this ſubject; that the argument founded on this, went to ſhew that if none of the inhabitants of this pariſh would certify, a certificate from the inhabitants of the next, or of any other pariſh, would have anſwered the purpoſe. But he ſaid that the inſured could not ſubſtitute other terms or conditions in lieu of thoſe which all the parties to the contract had originally made.

APPENDIX.

No. I.

Form of a valued Policy of Inſurance upon Ships and Goods, by private Underwriters.

£. 10,000 S. G. Delivered the Day of } IN the name of God, *Amen.* as well in own name as for and in the name and names of all and every other perſon or perſons to whom the ſame doth, may, or ſhall, appertain, in part or in all, doth make aſſurance, and cauſe and them, and every of them, to be inſured, loſt or not loſt, at and from upon any kind of goods and merchandizes, and alſo upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ſhip or veſſel called *The* whereof is maſter, under God, for this preſent voyage or whoſoever elſe ſhall go for maſter in the ſaid ſhip, or by whatſoever other name or names the ſame ſhip, or the maſter thereof, is or ſhall be named or called: Beginning the adventure upon the ſaid goods and merchandizes from the loading thereof aboard the ſaid ſhip upon the ſaid ſhip, *&c.* and ſo ſhall continue and endure during her abode there, upon the ſaid ſhip, *&c.*; And further, until the ſaid ſhip, with all her ordnance, tackle, apparel, *&c.* and goods and merchandizes whatſoever, ſhall be arrived at upon the ſaid ſhip, *&c.* until ſhe hath moored at anchor twenty-four hours in good ſafety, and upon the goods and merchandizes until the ſame be there diſcharged and ſafely landed: And it ſhall be lawful for the ſaid ſhip, *&c.* in this voyage, to proceed and ſail to and touch and ſtay at any ports or places whatſoever without prejudice to this inſurance; the ſaid ſhip, *&c.* goods and merchandizes, *&c.* for ſo much as concerns the aſſureds, by agreement between the aſſureds and aſſurers, in this policy, are and ſhall be valued at

Touching the adventures and perils which we the aſſurers are contented to bear and do take upon us in this voyage, they are,

of the ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart and countermart, ſurprizals, takings at ſea, arreſts, reſtraints, and detainments of all kings, princes and people, of what nation, condition, or quality ſoever, barratry of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, and Ship, *&c.* or any part thereof; and in caſe of any loſs or misfortune it ſhall be lawful to the aſſureds, their factors, ſervants, and aſſigns, to ſue, labour and travel, for, in, and about, the defence, ſafeguard, and recovery, of the ſaid goods and merchandizes, and ſhip, *&c.* or any part thereof, without prejudice to this inſurance, to the charges whereof we the aſſurers will contribute each one according to the rate and quantity of his ſum hereiſn aſſured; And it is agreed by us the inſurers that this writing or policy of aſſurance ſhall be of as much force and effect as the moſt writing or policy of aſſurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elſewhere in *London*. And ſo we the aſſurers are contented, and do hereby promiſe and bind ourſelves, each one for his own part, our heirs, executors, and goods, to the aſſureds, their executors, adminiſtrators, and aſſigns, for the true performance of the premiſes, confeſſing ourſelves paid the conſideration due unto us for this aſſurance by the aſſured

at and after the rate of

In witneſs whereof we the aſſurers have ſubſcribed our names and ſums aſſured in *London*.

N. B. Corn, fiſh, ſalt, fruit, flour, and ſeed, are warranted free from average, unleſs general, or the ſhip be ſtranded;—Sugar, tobacco, hemp, flax, hides, and ſkins, are warranted free from average under five pounds *per cent.*; and all other goods, alſo the ſhip and freight, are warranted free of average under three pounds *per cent.* unleſs general, or the ſhip be ſtranded.

No. II.

Form of a Policy of Insurance on Ship and Goods, by the Royal Exchange Assurance Company.

S. G. } S. G. No.
N. } L

By the Corporation of the *Royal Exchange* Assurance.

IN the Name of God, *Amen*.

as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and causeth and them, and every of them, to be assured, lost or not lost,

upon any kind of goods and merchandizes whatsoever, loaden or to be loaden, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called *The* burthen, or thereabouts, whereof is master (under God) for this present voyage or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship or the master thereof is or shall be named or called: Beginning the adventure upon the said goods and merchandizes from and immediately following the loading thereof on board the said ship and upon the said ship, *&c.* and so shall continue and endure during her abode there upon the said ship, *&c.* and further until the said ship, with all her ordnance, tackle, apparel, *&c.* and goods and merchandizes whatsoever, shall be arrived at upon the said ship, *&c.* until she hath there moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes, until the same be there discharged and safely landed: And it shall be lawful for the said ship, *&c.* in this voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever, without prejudice to this Assurance, the said ship, *&c.* goods and merchandizes,

merchandizes, *&c.* for ſo much as concerns the aſſureds, (by agreement made between the aſſureds and the ſaid corporation in this policy), are and ſhall be rated and valued at

Sterling, without farther account to be given by the aſſureds for the ſame. Touching the adventures and perils which the ſaid corporation are contented to bear and do take upon them in this voyage, they are, of the ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart and countermart, ſurprizals, takings at ſea, arreſts, reſtraints, and detainments of all kings, princes, and people, of what nation, condition, or quality ſoever, barratry of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, and ſhip, *&c.* or any part thereof: And in caſe of any loſs or misfortune it ſhall be lawful to the aſſureds, their factors, ſervants, and aſſigns, to ſue, labour, and travel, for, in, and about, the defence, ſafeguard, and recovery, of the ſaid goods and merchandizes, and ſhip, *&c.* (or any part thereof), without prejudice to this aſſurance, to the charges whereof the ſaid corporation will contribute according to the rate and quantity of the ſum herein aſſured: And it is agreed by the ſaid corporation that this writing or policy of aſſurance ſhall be of as much force and effect as the ſureſt writing or policy of aſſurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elſewhere in *London*: And ſo the ſaid corporation are contented, and do hereby promiſe and bind themſelves and their ſucceſſors to the aſſureds, their executors, adminiſtrators, and aſſigns, for the true performance of the premiſes, confeſſing themſelves paid the conſideration due unto them for this Aſſurance by at and after the rate of *per cent.* In witneſs whereof the ſaid Corporation have cauſed their common ſeal to be hereunto affixed, and the ſum or ſums by them aſſured to be hereunder written, at their office in the *Royal Exchange* of *London* this Day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord

The ſaid corporation are content with this aſſurance for

Free

Free from all average on corn, flour, fiſh, ſalt, fruit, ſeed, hides, and tobacco, unleſs general, or otherwiſe ſpecially agreed.

Free from average on ſugar, rum, ſkins, hemp, and flax, under five *per cent.*; and on all other goods, and on ſhip, under three *per cent.* except general.

By order of the Court of Directors.

No. III.

Form of a Policy of Inſurance on Ship and Goods by the London Aſſurance Company.

SHIP AND GOODS.

London Aſſurance Houſe.

No. No. in *London.*

By the Governor and Company of the *London* Aſſurance.

IN the name of God, *Amen.*

as well in own name as for and in the name and names of all and every other perſon or perſons to whom the ſame doth, may, or ſhall, appertain, in part or in all, doth make aſſurance, and cauſeth and them, and every of them, to be aſſured, loſt or not loſt, at and from upon any kind of goods and merchandizes whatſoever; and alſo upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ſhip or veſſel called *The* whereof is maſter (under God) for this preſent voyage or whoever elſe ſhall go for maſter in the ſaid ſhip or veſſel, or by whatſoever other name or names the ſaid ſhip or veſſel, or the maſter thereof, is or ſhall be named or called: Beginning the adventure upon the ſaid goods and merchandizes from and immediately following the loading thereof aboard the ſaid ſhip or veſſel at and upon the

the ſaid ſhip or veſſel, &c. and ſo ſhall continue and endure during her abode there, upon the ſaid ſhip or veſſel, &c.; and farther, until the ſaid ſhip or veſſel, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatſoever, ſhall be arrived at and upon the ſaid ſhip or veſſel, &c. until ſhe hath moored at anchor twenty-four hours in good ſafety, and upon the goods and merchandizes, until the ſame be there ſafely diſcharged and landed: And it ſhall be lawful for the ſaid ſhip or veſſel, &c. in this voyage, to proceed and ſail to, and touch and ſtay at, any any ports or places whatſoever without prejudice to this aſſurance, the ſaid ſhip or veſſel, &c. goods and merchandizes, &c. for ſo much as concerns the aſſureds, (by agreement between the aſſureds and the *London* aſſurance), are and ſhall be rated and valued at without farther or other account to be given by the aſſureds for the ſame. Touching the adventures and perils, which the ſaid *London* aſſurance are contented to bear and do take upon them in this voyage, they are, of the ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart and countermart, ſurprizals, takings at ſea, arreſts, reſtraints, and detainments of all kings, princes, and people, of what nation, condition, or quality ſoever, barratry of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, and ſhip or veſſel, &c. or any part thereof: And in caſe of any loſs or misfortune, it ſhall be lawful to the aſſureds, their factors, ſervants, and aſſigns, to ſue, labour, and travel, for, in, and about, the defence, ſafeguard, and recovery, of the ſaid goods, merchandizes, and ſhip or veſſel, &c. or any part thereof, without prejudice to this aſſurance, to the charges whereof the ſaid *London* aſſurance will contribute according to the rate and quantity of the ſum herein aſſured; And it is agreed that this writing or policy of aſſurance ſhall be of as much force and effect as the ſureſt writing or policy of aſſurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elſewhere in *London*: And ſo the ſaid *London* aſſurance are contented, and do hereby promiſe and bind themſelves and their ſucceſſors to the aſſureds, their executors, adminiſtrators, and aſſigns, for the true performance of the premiſes, confeſſing themſelves paid the conſideration due unto them for this aſſurance by the aſſured, at and after the rate of per cent. In witneſs whereof the

ſaid

ſaid *London* aſſurance have cauſed their common ſeal to be hereunto affixed, and the ſum or ſums by them aſſured to be hereunder written, at their office in *London*, this day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord

Free from all average on corn, flour, fruit, fiſh, ſalt, and ſeeds, except general.

Free from average on ſugar, rum, hides, ſkins, hemp, flax, and tobacco, under five pounds *per cent.*; and on all other goods, and ſhip, under three pounds *per cent.* except general.

The ſaid governor and company are content with this aſſurance for

No. IV.

No. IV.

Form of a Bill of Bottomry, by deed poll, where the Ship is to go to ſeveral Ports.

TO ALL PEOPLE, *&c.* I *A. B.* of, &c. mariner, maſter, and part owner of the good ſhip or veſſel, called, *&c.* of *London*, of the burthen of two hundred tons, or thereabouts, now riding at anchor in the river *Thames*, within the port of *London*, do ſend greeting: WHEREAS the ſaid ſhip is now bound out upon a voyage from the ſaid port, unto the iſland of *Barbadoes*, and from thence, if occaſion ſhall be, to the iſland of *May*, and ſo to return back again to the ſaid iſland of *Barbadoes*, and thence to *London*, to end her voyage: NOW KNOW YE, that I the ſaid *A. B.* for myſelf, my executors and adminiſtrators, do covenant and grant, to and with *C. D.* of *&c.* (who, before the ſealing and delivery hereof, hath paid and advanced unto me the ſaid *A. B.* the ſum of 500 *l.* of lawful money of *Great Britain*, and is contented and hath agreed to ſtand to, and bear the adventure of the ſaid ſum upon the body of the ſaid ſhip, during the ſaid voyage), and to and with the executors, adminiſtrators, and aſſigns of the ſaid *C. D.* by theſe preſents: That the ſaid ſhip, with the firſt good wind and weather after the ..... day of ..... next enſuing the date hereof, ſhall depart from the ſaid river *Thames*, on the ſaid intended voyage, and ſhall, by God's grace, (the perils and dangers of the ſea, and reſtraint of princes and rulers excepted), return into the ſaid river *Thames* from her ſaid voyage before the expiration of fourteen months, to be accounted from the date of theſe preſents; and that the ſaid ſhip, in her ſaid intended voyage, ſhall not ſail or apply unto any other ports or places than thoſe before mentioned herein, unleſs ſhe ſhall be neceſſitated thereto, by extremity of weather, or other unavoidable accident. And that I the ſaid *A. B.* my executors, adminiſtrators, or aſſigns, ſhall and will well and truly pay, or cauſe to be paid, unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, at, *&c.* the ſum of 560 *l.* of lawful money of *Great Britain*, in reſpect of the adventure aforeſaid, if the ſaid ſhip ſhall go only to the iſland of *Barbadoes*, and from thence return to *London* to finiſh her ſaid intended voyage; and the ſum of 600 *l.* of like money,

if

if the ſaid ſhip ſhall go from thence to the iſland of *May*, and ſo return again to the ſaid iſland of *Barbadoes*, and thence to *London* to end her ſaid voyage: and that within one month after the return of the hull or body of the ſaid ſhip unto the river *Thames*, from her ſaid voyage. PROVIDED ALWAYS, and it is nevertheleſs the true intent and meaning of theſe preſents, That if the ſaid ſhip, in her intended voyage, ſhall happen to be loſt, miſcarry, or be taken by men of war, or pirates, that then this preſent writing or deed, and every covenant, payment, matter, and thing therein contained, on the part and behalf of me the ſaid *A. B.* to be done, paid, and performed, ſhall be void and of none effect: And that then I the ſaid *A. B.* my executors or adminiſtrators, ſhall not be anywiſe chargeable or liable to pay the ſaid ſeveral ſums before mentioned, or either of them, or any part thereof, to the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, but that he and they are to loſe the ſame, and every part thereof; any thing hereinbefore contained to the contrary thereof, in any wiſe notwithſtanding. AND it is agreed, by and between the ſaid parties to theſe preſents, that in caſe the ſaid ſhip ſhall not be returned unto the river *Thames*, from the ſaid intended voyage, at the end of fourteen months, to be accounted from the date of theſe preſents; and that, at the expiration of the ſaid fourteen months, there ſhall not be juſt proof made of the loſs happening within the time aforeſaid; that then, I the ſaid *A. B.* my executors, adminiſtrators, or aſſigns, ſhall and will, within twenty days next after the end and expiration of the ſaid fourteen months, well and truly pay, or cauſe to be paid, unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, at the place of payment aforeſaid, the ſaid ſum of 560 *l.* in caſe the ſaid ſhip ſhall go unto the ſaid iſland of *Barbadoes* as aforeſaid, and the ſaid ſum of 600 *l.* in caſe the ſaid ſhip ſhall go unto the ſaid iſland of *May* as aforeſaid; and that the ſaid *C. D.* ſhall not run the hazard and adventure of the ſaid ſum by him adventured as aforeſaid, upon the body of the ſaid ſhip, any longer than fourteen months, to be reckoned and accounted as aforeſaid. In witneſs, &c.

No. V.

No. V.

Form of a Reſpondentia Bond, upon an Eaſt India *Voyage.*

KNOW ALL MEN by theſe preſents, that I, *A. B.* of in the county of , mariner, am held and firmly bound to *C. D.* of, &c. in the ſum or penalty of 1000 *l.* of lawful money of *Great Britain*, to be paid to the ſaid *C. D.* or to his certain attorney, executors, adminiſtrators, or aſſigns, to which payment, well and truely to be made, I the ſaid *A. B.* do bind myſelf, my heirs, executors, and adminiſtrators firmly, by theſe preſents, ſealed with my ſeal, DATED this 23d day of *January*, in the forty-ſecond year of the reign of our Sovereign Lord *George* the third, by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord 1802.

WHEREAS the above named *C. D.* on the day of the date above written, advanced and lent unto the ſaid *A. B.* the ſum of 500 *l.* upon the goods, merchandize, and effects laden and to be laden on board the good ſhip or veſſel called *The Saint George*, now riding at anchor in the river *Thames* outward bound, and whereof one *E. F.* is commander. NOW THE CONDITION of this obligation is ſuch, that if the ſaid ſhip or veſſel do and ſhall, with all convenient ſpeed, proceed and ſail from and out of the ſaid river *Thames*, on a voyage to any port or place, ports or places, in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere beyond the *Cape of Good Hope*; and from thence do and ſhall ſail, return, and come back into the ſaid river *Thames*, at or before the end and expiration of 36 calendar months, to be accounted from the day of the date above written, and there to end her ſaid intended voyage, (the dangers and caſualties of the ſeas excepted); AND if the ſaid *A. B.* his heirs, executors, or adminiſtrators, do and ſhall within thirty days next after the ſaid ſhip or veſſel ſhall be returned to the ſaid port of *London*, from her ſaid intended voyage, or at and upon the end and expiration of the ſaid thirty-ſix calendar months, to be accounted as aforeſaid, (which of the ſaid times ſhall firſt and next happen), well and truly pay, or cauſe to be paid, unto the ſaid *C. D.* his executors, adminiſtrators,

adminiſtrators, or aſſigns, the full ſum of 500*l.* of lawful money of *Great Britain*, together with the ſum of 12*l.* of like lawful money *per* kalendar month, for each and every kalendar month; and ſo proportionably for a greater or leſs time than a kalendar month for all ſuch time, and ſo many kalendar months as ſhall be elapſed and run out of the ſaid thirty-ſix kalendar months, over and above twenty kalendar months, to be accounted from the day of the date above written; Or if, in the ſaid voyage, and within the ſaid thirty-ſix kalendar months to be accounted as aforeſaid, an utter loſs of the ſaid ſhip or veſſel by fire, enemies, men of war, or any other caſualties, ſhall unavoidably happen, and the ſaid *A. B.* his heirs, executors, or adminiſtrators, do and ſhall, within ſix kalendar months next after ſuch loſs, well and truly account for (upon oath if required), and pay unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, a juſt and proportionable average on all the goods and effects of the ſaid *A. B.* carried from *England* on board the ſaid ſhip or veſſel, and the net proceeds thereof, and on all other goods and effects which the ſaid *A. B.* ſhall acquire during the ſaid voyage, for or by reaſon of ſuch goods, merchandizes, and effects, and which ſhall not be unavoidably loſt; then the above written obligation to be void and of none effect, elſe to ſtand in full force and virtue.

Sealed and delivered,
(being firſt duly ſtamped)
In the preſence of

No. VI.

Form of a Policy of Inſurance upon a Life, for the Life of the inſured, by the SOCIETY FOR EQUITABLE ASSURANCES UPON LIVES.

THIS PRESENT INSTRUMENT OR POLICY OF INSURANCE witneſſeth, that whereas *A. B.* of in the county of hath entered into and become a member of the ſociety for EQUITABLE ASSURANCES on lives and ſurvivorſhips, according to a certain deed of ſettlement bearing date the ſeventh day of *September*, which was in the year of our Lord one thouſand ſeven hundred and fifty-two, and inrolled in his majeſty's court of *King's Bench* at *Weſtminſter*; and whereas the ſaid ſociety, relying upon the truth of a certain declaration, dated this day of made and ſigned by the ſaid *A. B.* touching the age, ſtate of health, and other circumſtances attending the ſaid *A. B.* have aſſured to the ſaid *A. B.* the ſum of pounds, to be paid to his executors, adminiſtrators, or aſſigns, after the deceaſe of the ſaid *A. B.* whenſoever the ſame ſhall happen; provided the ſaid aſſured does not exceed the age of years on this day of has had the ſmall-pox, and is not afflicted with any diſorder which tends to the ſhortening of life, (as in the ſaid declaration more fully is ſet forth), at and under the annual ſum or premium of

And whereas the ſaid aſſured hath executed the covenants uſually entered into by members of the ſaid ſociety, and hath paid ſuch premium for one whole year, commencing from the date of theſe preſents: Now we, whoſe names are hereunto ſubſcribed, and ſeals affixed, being two of the truſtees of the ſaid ſociety, do, for ourſelves, and our aſſigns, truſtees of the ſaid ſociety, covenant, promiſe, and agree, to and with the ſaid aſſured, and the executors, adminiſtrators, and aſſigns of the ſaid aſſured, that if the ſaid aſſured, or the aſſigns of the ſaid aſſured, ſhall yearly and every year, during the term of this aſſurance, continue to pay to the truſtees of the ſaid ſociety,

ſociety, or to any two or more of them, the annual ſum or premium aforeſaid, on or before the day of in every year; and ſhall obſerve, perform, fulfil, and keep all and ſingular the covenants, articles, clauſes, proviſos, conditions, and agreements, which on the part and behalf of the ſaid aſſured, are and ought to be obſerved, performed, fulfilled, and kept, according to the true intent and meaning of the ſaid deed of ſettlement: We, or our aſſigns, truſtees of the ſaid ſociety for the time being, will or ſhall, within ſix kalendar months, after ſatisfactory proof ſhall have been made of the death of the ſaid aſſured, well and truly pay, or cauſe to be paid, out of the ſtock or fund of the ſaid ſociety, unto the executors, adminiſtrators, or aſſigns, of the ſaid aſſured, the full ſum ſo hereby aſſured: Provided always, and it is hereby declared to be the true intent and meaning of this policy of aſſurance, and the ſame is accepted by the ſaid aſſured upon theſe expreſs conditions, that in caſe the ſaid aſſured ſhall die upon the ſeas, or ſhall go beyond the limits of *Europe*, unleſs licenſe be obtained from the court of directors, or ſhall die by his own hands, or by the hands of juſtice, or if the age of the ſaid aſſured does exceed years; or if the ſaid aſſured be now afflicted with any diſorder which tends to the ſhortening of life; or if the above mentioned declaration contains any untrue averment, this policy ſhall be void.

In witneſs, &c.

No. VII.

Form of a Policy of Inſurance againſt Fire.

By the Corporation of the *Royal Exchange* Aſſurance of Houſes and Goods from Fire.

THIS preſent inſtrument or policy of aſſurance witneſſeth, that whereas *A. B.* hath agreed to pay into the treaſury of the corporation of the *Royal Exchange, London*, for the aſſurance of from loſs or damage by fire. *Now know all men by theſe preſents*, That the capital ſtock, eſtate, and ſecurities of the ſaid corporation ſhall be ſubject and liable to pay, make good, and ſatisfy unto the ſaid aſſured, his heirs, executors, or adminiſtrators, any loſs or damage which ſhall or may happen by fire to the ſaid goods aforeſaid, (except ſuch goods as hemp, flax, tallow, pitch, tar, turpentine, glaſs, china, and earthen wares, writings, books of accounts, notes, bills, bonds, tallies, ready money, jewels, plate, pictures, gun-powder, hay, ſtraw, and corn unthreſhed), within the ſpace of twelve calendar months from the day of the date of this inſtrument or policy of aſſurance, not exceeding the ſum of and ſhall ſo continue, remain, and be ſubject and liable, as aforeſaid, from year to year, to be computed from the day of in every year, for ſo long time as the ſaid aſſured ſhall well and truly pay, or cauſe to be paid, the ſum of into the treaſury of the ſaid corporation, on or before the day of which ſhall be in each ſucceeding year, and the ſaid corporation ſhall agree thereto by accepting and receiving the ſame; which ſaid loſs or damage ſhall be paid in money immediately after the ſame ſhall be ſettled and adjuſted; or otherwiſe, if the ſaid loſs or damage ſhall not be adjuſted, ſettled, and paid within ſixty days after notice thereof ſhall be given to the ſaid corporation, by the ſaid aſſured, that then the ſaid corporation, their officers, workmen, or aſſigns, ſhall, at the charge of the ſaid corporation, at the end and expiration of the ſaid ſixty days, provide and ſupply the ſaid aſſured with the like quantity of goods of the ſame ſort and kind, and of equal value and goodneſs with thoſe burnt or

damnified by fire. *Provided always nevertheleſs*, and it is hereby declared to be the true intent and meaning of this deed or policy, that the ſaid ſtock, eſtate, and ſecurities of the ſaid corporation ſhall not be ſubject or liable to pay or make good to the aſſured any loſs or damage by fire which ſhall happen by any invaſion, foreign enemy, or any military or uſurped power whatſoever. *Provided alſo*, that this deed or policy ſhall not take place or be binding to the ſaid corporation, until the premium for one year is paid, or in caſe the ſaid aſſured ſhall have already made, or ſhall hereafter make any other aſſurance upon the goods aforeſaid, unleſs the ſame ſhall be allowed of and ſpecified upon the back of this policy: Or if the ſaid *A. B.* at the time when any ſuch fire ſhall happen, ſhall be in the poſſeſſion of, or let to any perſon who ſhall uſe or exerciſe therein the trade of a ſugar baker, apothecary, chemiſt, colour-man, diſtiller, bread or biſcuit baker, ſhip or tallow chandler, ſtable keeper, inn-holder, or maltſter, or ſhall be made uſe of for the ſtowing or keeping of hemp, flax, tallow, pitch, tar, or turpentine; but that in all or any of the ſaid caſes theſe preſents, and every clauſe, article, and thing, herein contained, ſhall ceaſe, determine, and be utterly void and of none effect, or otherwiſe ſhall remain in full force and virtue. In witneſs whereof, the ſaid corporation have cauſed their common ſeal to be hereunto affixed, the day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, *&c.* and in the year of our Lord one thouſand eight hundred .

N. B. This policy to be of no force if aſſigned, unleſs ſuch aſſignment be allowed by an entry thereof in the books of the company.

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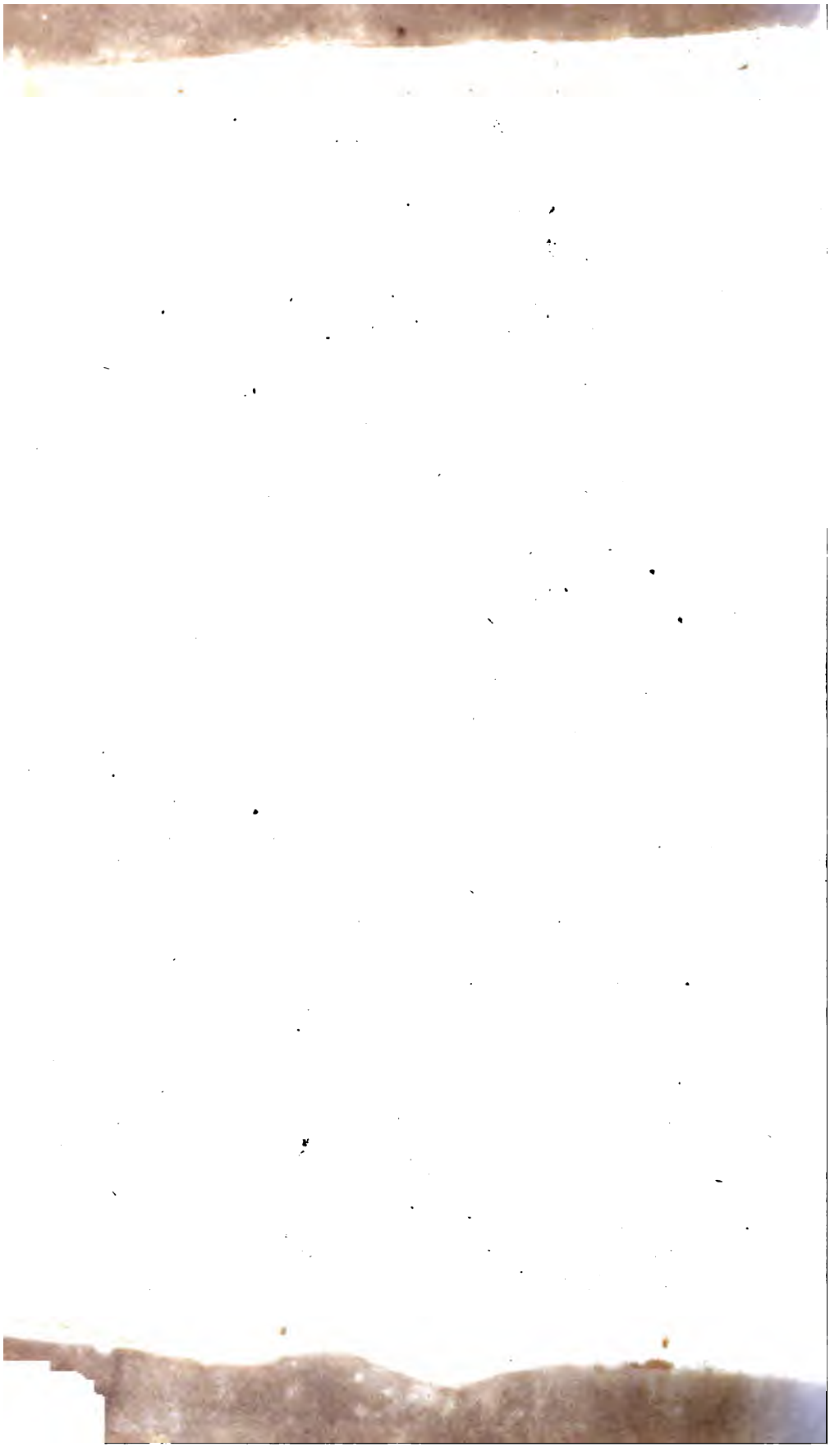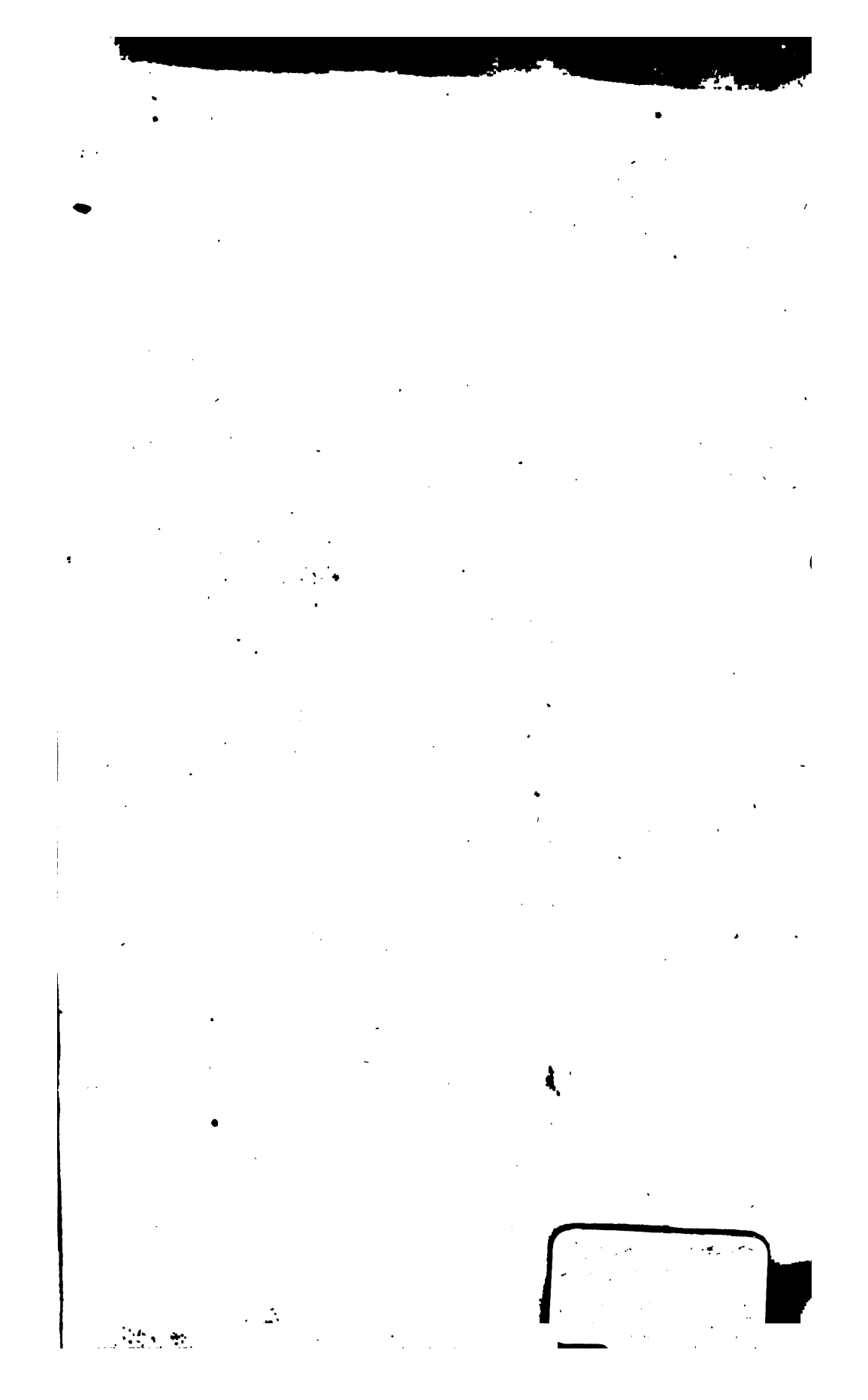
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